83-512

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

MILTON SUTTON AND EMMA SUTTON,
Petitioners

vs.

PHILIP R. BLOOM,
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a federal court's retroactive application of a restrictive statute of limitation adopted *after* institution of Petitioners' lawsuit, which was in direct contravention of the State of Ohio's policy *against* retroactive application of statutes of limitation, deprived Petitioners of due process of law, as guaranteed by the Fourteenth Amendment.

II. Whether the absence of any uniform guidelines for the lower federal courts to utilize in the determination of what state statute or statutes of limitation should be applied in civil rights actions, and the consequently arbitrary selection of a statute of limitation in the instant case has deprived Petitioners of due process of law, as guaranteed by the Fourteenth Amendment.

III. Whether the court below emasculated the scope of 42 U.S.C. § 1981 and thereby substantially impaired the important federal rights it protects thereby depriving Petitioners of due process of law, as guaranteed by the Fourteenth Amendment.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	vii
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	11
THERE ARE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED	15
I. RETROACTIVE APPLICATION OF A 180 DAY STATUTE OF LIMITATION TO PETITIONERS' §§ 1981 AND 1982 CAUSES OF ACTION DEPRIVED PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW	17
II. THE ABSENCE OF ANY UNIFORM GUIDELINES OR RULES FOR THE LOWER FEDERAL COURTS TO UTILIZE IN DETERMINING WHAT STATUTE(S) OF LIMITATION ARE THE MOST APPROPRIATE IN CIVIL RIGHTS LAWSUITS AND THE CONSEQUENTLY ARBITRARY SELECTION OF SUCH STATUTES BY THE COURTS OF APPEAL, INCLUDING THE COURT BELOW, HAS DEPRIVED PETITIONERS, AND OTHER CIVIL RIGHTS CLAIMANTS, OF THEIR RIGHT TO DUE PROCESS OF LAW, AND THUS, PRESENTS A SUBSTANTIAL FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW	21

PAGE

III. THE EMASCULATION BY THE COURT BELOW, OF THE SCOPE OF 42 U.S.C. § 1981, AND THE CONCOMITANT SUBSTANTIAL ABRIDGEMENT OF THE IMPORTANT FEDERAL RIGHTS IT PROTECTS, DEPRIVED PETITIONERS OF DUE PROCESS OF LAW 26

CONCLUSION 30

APPENDIX

A. Petitioners' First Amended Complaint, filed January 26, 1977 ..... A-1

B. Judgment of the Trial Court (United States District Court for the Northern District of Ohio, Eastern Division), dated April 12, 1978 ..... A-11

C. Respondent's Motion for Reconsideration, dated October, 1978 ..... A-12

D. Respondent's Motion to Dismiss or, In the Alternative, Motion for Summary Judgment, dated February, 1977 ..... A-15

E. Motion to Dismiss or for Summary Judgment of Defendant Paul Mancino, dated January, 1977 ..... A-17

F. Memorandum and Order of United States District Court for the Northern District of Ohio, Eastern Division, undated A-45

G. Decision of the Court of Appeals for the Sixth Circuit, dated June 27, 1983 ..... A-51

H. Federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* A-64

TABLE OF AUTHORITIES

Cases:

	PAGE
Adams v. Sherk, 4 Ohio St.3d 37, 446 N.E.2d 165 (1983)	20
Almond v. Kent, 459 F.2d 200 (4th Cir. 1972)	25
Associated General Contractors of California, Inc. v. California State Counsel of Carpenters, ... U.S. ....., 103 S.Ct. 897 (1983)	22
Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978)	22, 24
Boag v. Chief of Police, City of Portland, 669 F.2d 587 (9th Cir.), *cert. denied*, ... U.S. ....., 103 S.Ct. 109 (1982)	20
Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971)	23, 24, 25
Cook v. Matvejs, 56 Ohio St.2d 234, 383 N.E.2d 601 (1978)	20
Cooper v. Boory, 22 Ohio C.C. (n.s.) 555 (1903)	19
Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964)	18, 24, 25
Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979)	19
Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978)	24
Denny v. Hutchinson Sales Corp., 649 F.2d 816 (10th Cir. 1981)	24
Green v. Ten Eyck, 572 F.2d 1233 (1978)	24
Gregory v. Flowers, 32 Ohio St.2d 48, 290 N.E.2d 181 (1972)	20
Hazlet, Alexander & Co. v. Critchfield, 7 Ohio (pt. II) 153 (1936)	19

PAGE

Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973) 23, 24

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 17

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 22, 28, 29

Kittrell v. City of Rockwall, 526 F.2d 715 (5th Cir. 1976) 24

Knoll v. Springfield Township School District, 699 F.2d 137 (3d Cir. 1983) 23

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 23, 24

Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975) 17, 18, 24

Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894 (3d Cir. 1977) 21, 22, 23, 24

Monell v. Department of Social Services, 436 U.S. 658 (1978) 22

Monroe v. Pape, 365 U.S. 167 (1961) 22

Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980) 20, 24

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) 19, 23

Ohio Civil Rights Commission v. Lysyj, 38 Ohio St.2d 217, 313 N.E.2d 3 (1974), *cert. denied*, 419 U.S. 1108 (1975) 19

Polite v. Diehl, 507 F.2d 19 (3d Cir. 1974) 25

Rairden v. Holden, 15 Ohio St. 207 (1864) 20

Reed v. Hutto, 486 F.2d 534 (8th Cir. 1973) 21

Tillman v. Wheaton-Haven Recreation Association, Inc., 410 U.S. 431 (1973) 27, 28

United States v. Price, 383 U.S. 787 (1966) 22

	Page
Warner v. Perrino, 585 F.2d 171 (6th Cir. 1978)	24
Warren v. Norman Realty Co., 513 F.2d 730 (1975)	24
Watkins v. Barber-Colman, 625 F.2d 714 (5th Cir. 1980)	20
Zuniga v. Amfac Foods, Inc., 580 F.2d 38 (10 Cir. 1978)	21

Constitution:

U.S. CONST. Amend. XIV	i, 2
OHIO CONST. Art. II, § 28	2, 18

Statutes:

28 U.S.C. § 1254(1)	1
42 U.S.C. § 1981 (1976)	i, 2, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 29
42 U.S.C. § 1982 (1976)	2, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29
42 U.S.C. § 1983 (1976)	3, 18, 28, 29
42 U.S.C. § 1988 (1976)	3, 17, 19
42 U.S.C. § 2000(e)	23, 24, 29
42 U.S.C. §§ 3601 *et seq.*	4, 23, 29
OHIO REVISED CODE § 1.48	4, 18
OHIO REVISED CODE § 1.58	4, 18
OHIO REVISED CODE § 2305.07	5, 18
OHIO REVISED CODE § 2305.09	5, 18
OHIO REVISED CODE § 4112.02(H)	6, 19
OHIO REVISED CODE § 4112.051	10, 18, 19

Other Authorities Cited:

Note, "A Limitation on Actions for Deprivation of Federal Rights", 68 Colum. L. Rev. 763 (1968)	21
29 A.L.R. Fed. 710 (1976)	21
45 A.L.R. Fed. 548 (1979)	21

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, which appears in the Appendix, pp. A-51 - A-63, *infra*, is reported at 710 F.2d 1188 (1983).

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Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

JURISDICTION

Milton Sutton and Emma Sutton, Petitioners, petition for a Writ of Certiorari from the final judgment of the Court of Appeals for the Sixth Circuit, dated June 27, 1983, denying Petitioners relief on the federal constitutional and statutory grounds delineated above under the heading of Questions Presented.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition for Writ of Certiorari is being docketed in accordance with Rule 12 of the Revised Rules of this Court, within 90 days from the date upon which the Court of Appeals for the Sixth Circuit entered its final judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

ARTICLE II, SECTION 28, OHIO CONSTITUTION:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white

citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the in-

fliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §§ 3601 ET SEQ.:
(FEDERAL FAIR HOUSING ACT)

See Appendix, pp. A-64 - A-82.

SECTION 1.48, OHIO REVISED CODE ANNOTATED:

A statute is presumed to be prospective in its operation unless expressly made retrospective.

SECTION 1.58, OHIO REVISED CODE ANNOTATED:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, pro-

ceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

SECTION 2305.07, OHIO REVISED CODE ANNOTATED:

Except as provided in section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

SECTION 2305.09, OHIO REVISED CODE ANNOTATED:

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

SECTION 4112.02(H), OHIO REVISED CODE ANNOTATED:

It shall be an unlawful discriminatory practice:

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold housing accommodations from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of such housing;

(2) Represent to any person that housing is not available for inspection when in fact it is available;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing or otherwise withhold financing of housing from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing, provided such person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend.

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured

by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member thereof;

(7) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, ancestry, handicap, or national origin;

(8) Make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, ancestry, handicap, or national origin in connection with the sale or lease of any housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction rehabilitation, repair, or maintenance of housing;

(9) Include in any transfer, rental, or lease of housing any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant, provided that the prior inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(10) Induce or solicit or attempt to induce or solicit a housing listing, sale, or transaction by representing that

a change has occurred or may occur with respect to the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, sex, ancestry, handicap, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or to discriminate against any person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, national origin, handicap, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Whether or not acting under color of law, by force or threat of force willfully injure, intimidate, or inter-

fere with, or attempt to injure, intimidate, or interfere with:

(a) any person because of race, color, religion, sex, national origin, handicap, or ancestry and because that person is or has been selling, purchasing, renting, financing, occupying, contracting, or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting housing accommodations;

(b) Any person because that person is or has been, or in order to intimidate that person or any other person or any class of persons from:

(i) Participating, without discrimination on account of race, color, religion, sex, national origin, handicap, or ancestry, in any of the activities, services, organizations, or facilities described in division (H)(13)(a) of this section;

(ii) Affording another person or class of persons opportunity or protection so to participate.

(c) Any person because that person is or has been, or in order to discourage that person or any other person from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, national origin, handicap, or ancestry, in any of the activities, services, organizations, or facilities described in division (H)(13)(a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

No person shall discourage or attempt to discourage the purchase by a prospective purchaser of a housing unit, by representing that any block, neighborhood, or area has undergone or might undergo a change with respect to the religious, racial, sexual, or ethnic composition of the block, neighborhood, or area.

(14) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold a burial lot from any person because of the race, color, sex, age, ancestry, handicap, or national origin of any prospective owner or user of such lot.

SECTION 4112.051, OHIO REVISED CODE ANNOTATED:

(A) The rights granted by division (H) of section 4112.02 of the Revised Code may be enforced by aggrieved private persons by filing civil actions in a court of common pleas. No person shall be compelled to be a witness against himself. A civil action shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occurred.

(B) If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

(C) Any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this section, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of a charge by a complainant under division (H) of section 4112.02 of the Revised Code or a civil action under this section is not affected.

(D) Upon application by the plaintiff and in such circumstances as the court deems just, the court in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of costs.

(E) The court may grant such relief as it deems appropriate, including a permanent or temporary injunction,

temporary restraining order, or other order, and may award to the plaintiff actual damages, together with the court costs.

(F) The court shall notify the Ohio Civil rights commission of any finding pertaining to discriminatory housing practices within fifteen days of the finding.

STATEMENT OF THE CASE

On or about January 18, 1973, Milton and Emma Sutton ("Petitioners"), black citizens, entered into a purchase agreement to buy a private home located at 15459 Wenhaven Drive, Russell, Ohio (the "Premises"). The Premises were, at that time, in the process of foreclosure by Central National Bank of Cleveland. When Phillip R. Bloom ("Respondent"), the owner of the property located next door to the Premises, learned of Petitioners' offer, he immediately presented a secondary offer. In the matter of a single day, Respondent called the real estate agent, looked at the Premises, met with the agent and signed an offer to purchase the Premises. Petitioners then, however, immediately withdrew the contingencies to which their offer was subject, and Respondent failed in his attempt to obtain the Premises by a superseding contract.

Despite Petitioners' purchase agreement, Central National Bank elected to proceed with the scheduled sheriff's sale of the foreclosed upon property. That sale was scheduled for February 8, 1973. At the sheriff's sale, Respondent appeared and bid $40,000, thus outbidding Petitioners for the Premises.

On March 28, 1973, the Court of Common Pleas of Geauga County, Ohio refused to confirm the sheriff's sale of the Premises to Respondent, and instead awarded the Premises to Petitioners on the basis of its finding that Petitioners, by virtue of their purchase contract, had the benefit of the owner's equity of redemption in those pro-

ceedings. Respondent had filed a motion with the Common Pleas Court on March 23, 1973 asking that he be made a party to the foreclosure litigation.

Respondent then proceeded to file a notice of appeal from that Order. While the appeal was pending, on April 4, 1973, he obtained a stay of execution of the judgment of the Common Pleas Court of March 28, 1973. In doing so, Respondent effectively blocked Petitioners from taking possession of the Premises while the "appeal" was pending. Ultimately, the "appeal" was dismissed by the Ohio Court of Appeals, without dissent, since it was "obvious" that the appeal had been taken from a non-appealable order. Respondent then applied to the Court of Appeals for reconsideration of its dismissal, but the application was denied and the case was remanded to the Geauga County Common Pleas Court.

On March 18, 1974, the Common Pleas Court again ruled that the sheriff's sale should not be confirmed. This time the Court entered a final order transferring title to Petitioners. Respondent once again appealed to the Ohio Court of Appeals and once more filed a motion to stay execution of the judgment. This time the Court of Appeals overruled the motion to stay the proceedings. Then, after the Common Pleas Court entered its final judgment on March 21, 1974, dismissing the foreclosure action, Respondent, for a third time, filed a motion to stay execution. Again, on April 4, 1974, the Court of Appeals overruled Respondent's motion to stay.

On February 18, 1975, the Court of Appeals heard the case on its merits and affirmed the trial court. Respondent once again moved for a reconsideration, and once again the Court of Appeals affirmed the trial court's decision.

Thereafter, Respondent moved the Court of Appeals for an order certifying the case to the Ohio Supreme Court on the ground that there was a conflict between its decision

and that of another Court of Appeals in Ohio. The Court of Appeals overruled the motion to certify, and Respondent then appealed to the Supreme Court of Ohio. The Ohio Supreme Court found the appeal to be so groundless that the court, *sua sponte*, disposed of it on October 24, 1975. At the same time, the Supreme Court refused to order the Court of Appeals to certify its record to it.

Having thus exhausted that particular line of litigation, Respondent thereafter embarked upon two others. In May, 1974, Respondent filed an action in the Geauga County Common Pleas Court against Petitioners seeking, *inter alia*, $100,000 in actual damages and $3,000,000 in punitive damages, on the basis of an alleged willful, malicious, intentional and illegal participation in a "conspiracy" to deprive Respondent of his constitutional and statutory right to purchase the Premises.

The trial court, finding no merit in this claim, dismissed it on the pleadings, holding that the matter was *res judicata* due to the earlier stream of lawsuits. Respondent again appealed. Once again, the Court of Appeals upheld the trial court, holding that the dismissal was proper in that, *inter alia*, Respondent had failed to state a claim against Petitioners. Respondent once more applied for reconsideration, which motion was predictably overruled. Respondent then appealed that latest decision to the Ohio Supreme Court, and once more, the appeal was dismissed *sua sponte* (on January 8, 1976).

Further, at the same time that Respondent filed his second action in the Geauga County Common Pleas Court, he filed a companion case, substantially similar to the Geauga County action, in the United States District Court, Northern District of Ohio, Eastern Division, praying for $100,000 compensatory and $3,000,000 punitive damages, again alleging that Petitioners had conspired with others to purchase the real estate in question. Judge William K. Thomas dismissed the complaint for failure to state

a claim. Respondent then moved for a new trial or for a rehearing. That motion was denied. Thereafter Respondent appealed Judge Thomas' decision to the Sixth Circuit Court of Appeals. The Sixth Circuit rejected the appeal, concluding that ". . . this action is nothing more than an attempt to utilize jurisdiction for the purpose of reversing or modifying the civil judgment of the state court . . ."

The ultimate result of all of the actions of Respondent and his complex web of legal maneuvers was to deprive Petitioners of actual possession of their home for an entire year, to harass and annoy them for many months thereafter and to cost them legal fees exceeding $15,000.

Petitioners brought the instant action in the United States District Court, Northern District of Ohio, Eastern Division. In their Complaint[1], Petitioners alleged that their constitutional rights guaranteed by, *inter alia,* 42 U.S.C. §§ 1981 and 1982 had been violated by the several defendants, both in their actions as individuals as well as in conspiracy with each other, and also that Petitioners had been the victims of malicious prosecution.

On March 15, 1978, the matter came on for trial before Judge Thomas against defendants Phillip and Mary Louise Bloom and Mr. and Mrs. Lee Peters. The other defendants had either settled with Petitioners before trial or had been dismissed from the case for one reason or another.

On April 12, 1978, a jury verdict and a judgment were entered against Respondent and in favor of Petitioners in the amount of $33,101.34 in compensatory damages and $30,000 in punitive damages.[2] The remaining defendants were dismissed from the case.

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[1]Appendix, pp. A-1 - A-10.

[2]Appendix, p. A-11.

During the course of the litigation in the District Court, Respondent raised the issue of whether Petitioners' claims were barred on statute of limitation grounds.[3] The District Court, in a well reasoned opinion, held that Petitioners' actions had been timely brought.[4]

Respondent appealed the decision of the trial court on many grounds, including the statute of limitation issue. On June 27, 1983, the Sixth Circuit Court of Appeals, over a vigorous dissent, reversed the decision of the District Court, holding that Petitioners' claims were barred by the statute of limitation.[5]

THERE ARE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

This appeal presents several important federal questions. First, the Sixth Circuit's decision, if allowed to stand, will deprive many future plaintiffs of due process of law. In direct contravention of well established Ohio law, as set forth by the Ohio Supreme Court, the Court below retroactively applied statutes of limitation both to Petitioners' §§ 1981 and 1982 claims, thereby totally precluding Petitioners from obtaining relief for the violations of their constitutional rights caused by Respondent. At the time Petitioners filed their lawsuit, they complied with all rational and reasonable guidelines concerning the timeliness of such filing, *i.e.*, the statutes and case law in effect at that time.

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[3]The issue was initially raised in Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, Appendix, pp. A-15 - A-16, which incorporated the Motion to Dismiss or for Summary Judgment of another defendant, Appendix, pp. A-17 - A-44. It was again raised in Respondent's Motion for Reconsideration, Appendix, pp. A-12 - A-14. It is with respect to this last motion that the District Court below addressed the statute of limitation question.

[4]Appendix, pp. A-45 - A-50.

[5]Appendix, pp. A-51 - A-63.

To require them and all future plaintiffs to foresee the future and predict a change in the applicable statute of limitation, and to require them to file their lawsuit in accordance with such futuristic changes, is to ask the impossible. Moreover, to do so, is to deprive Petitioners, and all other similarly situated plaintiffs, of their right to due process of law.

Secondly, this appeal brings to this Court the opportunity to provide guidelines to the confused and confusing decisions of the various courts of appeal in connection with the delineation of the most analogous state statutes of limitation in civil rights cases. In other areas of federal law, *i.e.*, antitrust standing, this Court has recognized that when an important federal right is at stake, the availability and enforcement of that right should not depend upon which state an aggrieved party resides in, or upon the whim or arbitrary decision of a particular court of appeals. By not providing the circuit courts with guidelines in the determination of the most analogous state statute of limitation, the important rights protected by the Civil Rights Act are adversely affected. Thus, such guidelines should be established by this Court, so as to avoid having persons, like Petitioners, being deprived of due process of law via the application of an inappropriate statute of limitation.

Finally, this appeal involves the attempted abridgement of an important federal right, § 1981. The Court below in essence rewrote § 1981 so that it does not apply where a plaintiff's claim even tangentially involves real property. However, Congress, as this Court has recognized, enacted two separate and distinct causes of action, §§ 1981 *and* 1982, and the existence of one such cause of action does *not* bar proceeding on the basis of the other. Such reconstruction of federal legislation by such judicial fiat emasculates the important federal rights protected by

§ 1981, has deprived Petitioners of due process of law and should not be permitted.

I. RETROACTIVE APPLICATION OF A 180 DAY STATUTE OF LIMITATION TO PETITIONERS' §§ 1981 AND 1982 CAUSES OF ACTION DEPRIVED PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Section 1988[6] provides that where, *inter alia*, §§ 1981 and 1982 "are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law", the law of the State wherein the adjudicating federal court sits shall be applied, "so far as the same is not inconsistent with the Constitution and laws of the United States." In other words, since Congress did not provide for a directly applicable statute of limitation for §§ 1981 or 1982, the federal courts must apply the most appropriate and analogous statute of limitation of the state in which such federal court sits.[7] In applying this standard to the case at bar, therefore, the Ohio statute or statutes of limitation most closely analogous to § § 1981 and 1982, respectively, govern each such action.

In the instant case, when Petitioners brought their action against Respondent, on July 30, 1976, the Sixth Circuit Court of Appeals had held that, in actions brought under § 1982, the most analogous Ohio statute of limita-

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[6] 42 U.S.C. § 1988 (1976).

[7] *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 521 (6th Cir. 1975).

tion was four years,[8] and that with respect to actions brought under § 1981, the most analogous statute of limitation was six years.[9] Thus, when Petitioners brought their suit, they were within all established and applicable statutes of limitation.

In reversing the trial court, the Court of Appeals below held that the 180 day statute of limitation set forth in the Ohio Fair Housing Act[10] applied to *both* Petitioners' §§1981 and 1982 causes of action. By so holding, the court below in effect adopted a new statute of limitation (180 days) for §§ 1981 and 1982 suits and retroactively applied it to Petitioners' suit.

It is well established in Ohio that there shall be no retroactive application of laws.[11] Unless a statute expressly states otherwise, a "statute is presumed to be prospective in its operation."[12] Moreover, Ohio case law has long held

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[8]*Crawford v. Zeitler*, 326 F.2d 119 (6th Cir. 1964), which held in an action brought under §§ 1982, 1983 and 1985 that the most analogous state statute of limitation with respect to such causes of action was Ohio Revised Code § 2305.09, which provided a four year limitation on actions "For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12 inclusive, 2305.14 and 1304.29 of the Revised Code."

[9]*Mason v. Owens-Illinois, Inc., supra*, which held that Ohio Revised Code § 2305.07, dealing with "an action upon a contract not in writing, express or implied, or *upon a liability created by statute* other than a forfeiture or penalty shall be brought within six years after the cause thereof accrued" was the Ohio statute of limitation most analogous to § 1981. (*Emphasis added*). *Id.* at 522.

[10]Ohio Revised Code § 4112.051.

[11]Ohio Const. Act II, § 28.

[12]Ohio Revised Code § 1.48. *See also*, Ohio Revised Code § 1.58, which provides, in relevant part:

> (A) The . . . amendment . . . of a statute does not . . .
>
> (1) Affect the prior operation of the statute or any prior action taken thereunder;
>
> (2) Affect any . . . right . . . previously . . . accrued . . . thereunder . . .

that "all actions and causes of action *must* be governed by the limitation law in force *at the time the cause of action accrued*".[13] By applying a new 180 day statute of limitation to §§ 1981 and 1982[14] actions, the court below deprived Petitioners of their rights to obtain redress for an egregious violation of substantial federal rights. Such a violation of Petitioners' due process rights should not be permitted to stand.

It may be argued that Ohio courts have, in the past, held that statutes affecting only procedural matters may

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[13]*Hazlet, Alexander & Co. v. Critchfield*, 7 Ohio (pt. II) 153, 156 (1836) (*emphasis added*). *Accord, Cooper v. Boory*, 22 Ohio C.C.(n.s.) 555, 538 (1903).

[14]Furthermore, it should be noted that the Ohio Fair Housing Act, Ohio Revised Code § 4112.02(H), is much narrower in scope and remedy than § 1982. For example, in keeping with the broad remedial scope of the federal civil rights acts, an aggrieved party may recover both punitive damages and attorney's fees in a § 1982 cause of action. 41 U.S.C. § 1988; *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979).

Conversely, the Ohio Fair Housing Act specifically provides *only* for the recovery of actual damages:

> The court may grant such relief as it deems appropriate. . . and may award to the plaintiff *actual* damages, together with court costs (*emphasis added*).

Ohio Revised Code § 4112.051(E). As the Ohio Supreme Court has held, only damages *explicitly* provided for in the Fair Housing Act may be awarded. *Ohio Civil Rights Commission v. Lysyj*, 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974), *cert. denied* 419 U.S. 1108 (1975). Since the only award specifically provided for in the Ohio Fair Housing Act is "actual damages, together with court costs", the granting of punitive damages has not been authorized by the Ohio legislature and thus, may not be awarded under such act to a victim of housing discrimination. For this reason, the instant action could not have been brought under the Ohio Fair Housing Act, and therefore, the limitation period therein should not apply to a § 1982 action. To do so would frustrate the implementation of our national policy against racial discrimination. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977).

be retroactively applied, and therefore, a statute of limitation, itself a procedural matter, can, in fact, be retroactively applied.[15] However, the Ohio Supreme Court has repeatedly noted in recent years that "the effects of their [statute of limitation] increasingly automatic characterization as [procedural or remedial] have proved burdensome in many respects."[16] Thus, "the reasons that once existed for ignoring the very substantive effects of retroactively applying some statutes of limitations have long since vanished."[17] Therefore, so long as a litigant or claimant is still afforded a "reasonable time", *after the effective date* of the amendment, enactment or adoption of a statute of limitation, in which to enforce his rights, such a statute may be applied to causes of action that accrued before its amendment, enactment or adoption.[18] Since the court below, in direct contradiction to decisions of the Ohio Supreme Court, provided for *no* period of time whatsoever after the effective date of the statutes of limitation it applied, Petitioners have been deprived of their constitutional right to due process of law.[19]

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[15]*See, e.g., Rairden v. Holden*, 15 Ohio St. 207 (1864).

[16]*Gregory v. Flowers*, 32 Ohio St. 2d 48, 55, 290 N.E. 2d 181 (1972).

[17]*Id.* at 57.

[18]*Cook v. Matvejs*, 56 Ohio St. 2d 234, 383 N.E. 2d 601 (1978). *Accord, Adams v. Sherk*, 4 Ohio St. 3d 37, 446 N.E. 2d 165 (1983).

[19]Other courts of appeals have similarly refused to retroactively apply enactments, amendments or adoptions of statutes of limitation, when the policy of the appropriate state was to the contrary. *See, e.g., Boag v. Chief of Police, City of Portland*, 669 F.2d 587 (9th Cir.), *cert. denied* ... U.S. ..., 103 S.Ct. 109 (1982) holding that under Oregon law, a retroactive application of a change in the limitation period was not permitted, absent a clear contrary intent; *Watkins v. Barber-Colman*, 625 F.2d 714, 717 (5th Cir. 1980), relying on the "well established rule in Georgia law that a statute cannot have retroactive application unless the language of the statute imperatively requires it"; *Movement for Opportunity and Equality v.*

II. THE ABSENCE OF ANY UNIFORM GUIDELINES OR RULES FOR THE LOWER FEDERAL COURTS TO UTILIZE IN DETERMINING WHAT STATUTE(S) OF LIMITATION ARE THE MOST APPROPRIATE IN CIVIL RIGHTS LAWSUITS AND THE CONSEQUENTLY ARBITRARY SELECTION OF SUCH STATUTES BY THE COURTS OF APPEAL, INCLUDING THE COURT BELOW, HAS DEPRIVED PETITIONERS AND OTHER CIVIL RIGHTS CLAIMANTS OF DUE PROCESS OF LAW, AND THUS PRESENTS A SUBSTANTIAL FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW.

As many courts and commentators have noted, the decisions of the federal courts have not reached any consensus as to which type of statute of limitation should apply to civil rights actions, *or*, more importantly, as to the approach that should be followed in determining the type of statute of limitation that should apply.[20] Despite the variance in state statutes of limitation, and in factual patterns presented before the various courts, the divergence in *approach* taken in the determination of the most analogous statute of limitation accounts significantly for the lack of uniformity among the circuits.[21]

General Motors Corp., 622 F.2d 1235, 1244 (7th Cir. 1980), wherein the court refused to apply the Indiana statute of limitation for "all employment related actions" to plaintiffs' § 1981 claim, where the state statute had been enacted subsequent to the initiation of plaintiffs' lawsuit.

[20]*See, e.g., Zuniga v. Amfac Foods, Inc.*, 580 F.2d 380 (10th Cir. (1978); *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977); *Reed v. Hutto*, 486 F. 8d 534, 537, n. 2 (8th Cir. 1973); *Annot.*, 29 A.L.R. Fed. 710 (1976) (discussing § 1981 causes of action); *Annot.*, 45 A.L.R Fed. 548 (1979) (discussing § 1983 causes of action); Note, "A Limitation on Actions for Deprivation of Federal Rights," 68 Colum. L. Rev. 763 (1968).

[21]*See, Annot.*, 29 A.L.R. Fed. 710 (1976).

It is this lack of consensus among the lower federal courts[22] that has deprived Petitioners of their right to due process of law. At the very minimum, a consensus as to the approach to be taken and/or factors to be considered in determining the most analogous state statute of limitation should be enunciated, in view of the scope and purpose of the federal Civil Rights Act of 1964.[23] As has been repeatedly stated by this Court in numerous decisions involving varying fact patterns, the Act must be given a broad and sweeping interpretation, in order to affectuate the broad remedial purposes which it was enacted to achieve.[24]

In a different area of law, that of antitrust standing, this Court has recently held that "the infinite variety of claims that may arise make it virtually impossible to announce a black letter rule that will dictate the result in every case".[25] Therefore, in order to implement uniformity among the circuits with respect to antitrust standing, as well as to discourage the use of analytical tests which might impermissibly restrict this matter, this Court identified certain "factors that circumscribe and guide the exercise of judgment" in assessing antitrust standing.[26]

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[22]The lack of consensus sometimes even occurs *within* a circuit. *See, Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); *Meyers v. Pennypack Woods Home Ownership Association, supra.*

[23]Hereinafter referred to as the "Act."

[24]*See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States v. Price*, 383 U.S. 787 (1966); *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grds., Monell v. Department of Social Services*, 436 U.S. 658 (1978).

[25]*Associated General Contractors of California, Inc. v. California State Counsel of Carpenters*, ... U.S. ...., 103 S. Ct. 897, 908 (1983).

[26]*Id.*

Likewise in the area of analogous state statutes of limitation for violations of civil rights laws, the "infinite variety of claims that may arise make[s] it virtually impossible to announce a black letter" statute of limitation that will dictate the results in every case. In order to discourage the use of improper approaches that may impermissibly restrict the scope, purpose and availability of the Act, this Court should enunciate factors that will "circumscribe and guide the exercise of judgment" of the lower federal courts in ascertaining the applicable state statute of limitation.[27]

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[27]This is particularly important "because '[s]tate legislatures do not devise their [statutes of limitations] with national interests in mind [.I]t is the duty of the federal courts [, therefore] to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.'" *Knoll v. Springfield Township School District*, 699 F. 2d 137, 141 (3d Cir. 1983), *citing Occidental Life Insurance Co. v. EEOC, supra* at 367.

In this regard, it is worth noting that it is questionable whether a 180 day statute of limitation would *ever* be appropriate for §§ 1981 and 1982 causes of action. In addition to § 1982, 42 U.S.C. §§ 3601 *et seq.* (the "Federal Fair Housing Act") also deal with discrimination in housing; similarly, Title VII of the Act, 42 U.S.C. § 2000e deals with discrimination in employment contracts, as does § 1981. However, it is clear that Title VII is *not* a limitation on § 1981, *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Boudreaux v. Baton Rouge Marine Contracting Company*, 437 F.2d 1011 (5th Cir. 1971), and that the Federal Fair Housing Act is *not* a limitation on § 1982. *Meyers v. Pennypack Woods Home Ownership Association, supra; Hickman v. Fincher*, 483 F.2d 855 (4th Cir. 1973); Thus, the limitations of Title VII and the Federal Fair Housing Act are inapplicable to §§ 1981 and 1982 respectively.

Many state employment contract discrimination suits are based on Title VII and many state fair housing acts are likewise based on their federal counterpart. However, to take the statute of limitation set forth in a state fair housing act, which is based on the Federal Fair Housing Act, would be contrary to the expressed intention of Congress and the courts not to impose the Federal Fair Housing Act's restrictions on § 1982. *Meyers v. Pennypack Woods Home*

The discord and divergence of opinion among the lower federal courts resulting from this lack of uniformity has caused Petitioners to be deprived of their right to due process.

This lack of uniformity can be readily illustrated. Some circuits have focused on the nature of the conduct involved in the violation alleged[28], whereas another circuit has expressly rejected this approach.[29] Some courts have looked at the nature of the conduct involved, as well as the injury to the plaintiff and the relief requested.[30] In certain circuits, sometimes one test has been applied, and other times, another has been applied, with little, if any, discussion of the reasons for the change.[31] Still other circuits have determined the most analogous state statute of limitation without any enunciation of the relative factors or without following any apparent standard or approach.[32]

Ownership Association, supra; Hickman v. Fincher, supra. The same is true with respect to § 1981 and Title VII. *Macklin v. Spector Freight Systems, Inc., supra; Boudreaux v. Baton Rouge Marine Contracting Company, supra.* To so permit would frustrate the national policies embodied in §§ 1981 and 1982.

[28]*Davis v. United States Steel Supply,* 581 F.2d 335 (3d Cir. 1978); *Green v. Ten Eyck,* 572 F.2d 1233 (1978); *Kittrell v. City of Rockwall,* 526 F.2d 715 (5th Cir. 1976); *Warren v. Norman Realty Co.,* 513 F.2d 730 (1975).

[29]The Seventh Circuit: *see, e.g., Movement for Opportunity and Equality v. General Motors Corp., supra; Beard v. Robinson, supra.*

[30]*Meyers v. Pennypack Wood Home Owners Association, supra.*

[31]Compare *Warner v. Perrino,* 585 F.2d 171 (6th Cir. 1978) (apparently focusing on the nature of the conduct involved) with *Mason v. Owens-Illinois, Inc., supra* (applying the statute of limitation for liability created by statute) and with *Crawford v. Zeitler, supra* (applying the statute of limitation for injury not arising on contract or otherwise enumerated in certain specified sections).

[32]*Denny v. Hutchinson Sales Corp.,* 649 F.2d 816 (10th Cir. 1981); *Hickman v. Fincher, supra; Macklin v. Spector Freight Systems, Inc., supra.*

This confusion and complexity is not limited to the factors considered in the ascertainment of the most analogous state statute of limitation. Some courts have held that, when several violations of the Act have been sued for, such claims are *not* necessarily governed by a single statute of limitation; rather, each claim must be individually analyzed in order to determine the state statute of limitation most analogous to that particular claim.[33] These courts have correctly noted that the application of a single statute in such a case would have "an anomolous result", since the joining of more than one claim "would extend the statute which would be applicable to [one claim] or contract the statute that would be applicable to [the other] if plaintiff had raised only one of the claims or had raised them in separate actions [footnote omitted]."[34] Yet another circuit has refused to fragment a civil rights claim.[35] Similarly, the court below refused to recognize the separate, distinct and individual nature of Petitioners' § 1981 and § 1982 claims, and held that a 180 day statute of limitation applied to the entire lawsuit. As will be discussed in detail below, this substantially abridged an important federal right.

In sum, the courts of appeals are in alarming disarray as to the approach to be taken in determining the most analogous state statute of limitation, when a violation or violations of the Act are claimed. In view of the importance of the rights protected by the Act, this lack of uniformity has deprived Petitioners of their right to due process under the law, and will continue to deprive other claimants of such right, unless remedied by this Court.

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[33]*See, e.g., Polite v. Diehl*, 507 F.2d 19 (3d Cir. 1974); *Boudreaux v. Baton Rouge Marine Contracting Co., supra; Crawford v. Zeitler, supra.*

[34]*Polite v. Diehl, supra* at 123.

[35]*Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972).

III. THE EMASCULATION, BY THE COURT BELOW, OF THE SCOPE OF § 1981 AND THE CONCOMITANT SUBSTANTIAL ABRIDGEMENT OF THE IMPORTANT FEDERAL RIGHTS IT PROTECTS, DEPRIVED PETITIONERS OF DUE PROCESS OF LAW.

As discussed in Part I, *supra*, to determine the proper statute(s) of limitation to apply to a cause of action under §§ 1981 and 1982, a court must look to the most analogous state statute(s). The court below has ostensibly interpreted this principle to mean that a court has free rein to refashion a plaintiff's claim. In so doing, it deprived Petitioners of their valid cause of action under § 1981. The court below chose to treat Petitioners' claim as one based *solely* upon § 1982. In so doing, it completely ignored Petitioners' separate and independent cause of action under § 1981 and thereby deprived Petitioners of a substantial federal right.

It is clear that §§ 1981 and 1982 provide aggrieved parties with two *independent* causes of action. Section 1981 extends to all persons the same right "to make and enforce contracts",[36] whereas § 1982 extends to all persons the right "to inherit, purchase, lease, sell, hold and convey real and personal property."[37] As evidenced by their Complaint,[38] Petitioners have more than sufficiently alleged facts establishing the elements of *both* interference with their right to purchase realty and interference with their contractual relations, on the basis of race. Thus, Petitioners' suit against Respondent for violations of *both* §§ 1981 and 1982 was appropriate.

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[36]42 U.S.C. § 1981 (1976).

[37]42 U.S.C. § 1982 (1976).

[38]Plaintiffs filed an original Complaint which named eight defendants, including Respondent. An Amended Complaint was subsequently filed, which added two more defendants. *See*, Appendix pp. A-1 - A-10.

As this Court recognized in *Tillman v. Wheaton-Haven Recreation Association, Inc.*,[39] a claim may be grounded on *both* §§ 1981 and 1982. In *Tillman*, plaintiffs asserted the violation of §§ 1981 and 1982 because a black had been denied membership to a private swimming pool association on racial grounds. The plaintiffs' basis for asserting two separate causes of action was that membership in this association was both a property interest *and* a contract between the member and the association. Conversely, the defendant contended that it was a private club and therefore exempt from §§ 1981 and 1982. The district court and the court of appeals agreed with the defendant. This Court reversed the lower courts and ordered the district court to re-evaluate the plaintiffs' claims under *both* §§ 1981 and 1982.[40]

Despite this Court's decision in *Tillman v. Wheaton-Haven Recreation Association, Inc., supra*, the court below precluded Petitioners from asserting their valid cause of action under § 1981. The court ignored Respondent's substantial and continuous interference with Petitioners' right to contract and instead chose to reform their claims as solely under § 1982. However, the fact that Petitioners' action involved discrimination in connection with the purchase of realty does *not* warrant ignoring the harm caused by Respondent's interference with Petitioners' right to contract, any more than the fact that the action involved interference with contract rights would warrant ignoring the harm caused by discrimination in connection with the purchase of realty. So long as Petitioners are able to carry their burden of establishing the elements of each of the causes of action available to them, they were entitled to sue under *each* such cause of action, with the laws respecting each action governing them respectively.

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[39]410 U.S. 431 (1973).

[40]*Id.* at 440.

By in essence judicially rewriting § 1981, the court below has deprived Petitioners of a substantial and important federal right. As recognized by *Tillman v. Wheaton-Haven Recreation Association, Inc., supra,* §§ 1981 and 1982 are two *separate and distinct* causes of action.[41] The Court below ignored Petitioners' separate § 1981 action by recharacterizing Petitioners' claims as being under § 1982 only. Therefore, the Sixth Circuit would construe § 1981 as encompassing only those claims that do not involve the elements of a § 1982 claim. Such a restriction on § 1981 is in direct contradiction with the broad and remedial scope and purpose of § 1981, indeed, of the entire Act, of totally eradicating all forms of racial discrimination, in whatever manner manifested.[42]

Taking the position of the court below to its logical extreme, it would appear that only "pure" § 1981 causes of action may be brought as such. In other words, according to the court below, if a plaintiff's claim even tangentially involves real property, *no* § 1981 cause of action exists in the Sixth Circuit.

The problems that arise from this interpretation of § 1981 are readily apparent. First, what level of involvement of housing is necessary in order for a § 1981 cause of action to be deemed a § 1982 cause of action? Fifty percent? Sixty percent? Seventy-five percent? Furthermore, how is such an analysis to be made? What factors guide a court's recharacterization of a § 1981 claim as one under § 1982?

Moreover, under the Sixth Circuit's view, if a plaintiff had a cause of action under § 1983[43], which also encom-

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[41]Then, according to the appropriate means of determining the most analogous statute statutes of liimitation, see Part II *supra,* each cause of action could be analyzed and the relevant statute or statutes of limitation applied to §§ 1981 and 1982, respectively.

[42]*See, e.g., Jones v. Alfred Mayer Co., supra.*

[43]42 U.S.C. § 1983 (1976).

passed, even tangentially, real or personal property, that § 1983 claim could be recharacterized, after the fact, by a court of appeals or even a district court as a § 1982 action and therefore dismissed for failure to comply with a 180 day statute of limitation. This Court has always recognized the important federal rights protected by § 1983.[44] To permit such arbitrary recharacterization of civil rights claims would conflict with the scope and purpose of the Act, as well as deprive victims of racial discrimination due process of law.

In sum, in enacting the federal civil rights acts, Congress' purpose was to totally eliminate all forms of racial discrimination. The Federal Fair Housing Act and Title VII, as well as each section of the Act, are aimed at accomplishing this goal. As discussed above, there is some overlap in these various provisions. However, Congress let this overlap stand and refused to let one provision or statute necessarily impair the rights protected and remedies provided for by another.[45] If Congress had intended § 1981 to exclude housing related contracts, it could easily have done so with one swoop of its pen. The same is true with respect to § 1983 actions involving housing. Instead, Congress enacted three separate and distinct provisions with which plaintiffs could fight racial discrimination. To arbitrarily recharacterize a cause of action under one of these sections on the sole ground that it involves some aspects of another would conflict with the scope and purpose of the federal civil rights acts, as well as deprive victims of racial discrimination the full panoply of rights and remedies Congress intended to provide them. Such substantial abridgement of these important federal rights should not be permitted and therefore mandates review by this Court.

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[44]*See, e.g., Jones v. Alfred H. Mayer Co., supra.*

[45]*See,* n. 27, *supra.*

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MILTON C. SUTTON
15459 Wenhaven Drive
Russell, Ohio 44022
and
EMMA SUTTON
15459 Wenhaven Drive
Russell, Ohio 44022
Plaintiffs

vs.

MR. AND MRS. PHILIP R. BLOOM
15473 Wenhaven Drive
Russell, Ohio 44022

MR. AND MRS. ROBERT C. BROSNAN
15516 Wenhaven Drive
Russell, Ohio 44022

DAVID SOLETHER dba SOLETHER REALTY
41 East Washington St.
Chagrin Falls, Ohio

PAUL MANCINO, JR.
One Public Square Building
Suite 1001
Cleveland, Ohio 44114
Defendants

and

MR. AND MRS. C. J. McLAUGHLIN, JR.
15483 Wenhaven Drive
Russell, Ohio 44022
and
MR. AND MRS. LEE A. PETERS
15417 Wenhaven Drive
Russell, Ohio 44022
New Party Defendants

Case No.
C-76-767

Judge
William K. Thomas

First Amended Complaint

Jury Trial Demanded

JURISDICTION

1. Jurisdiction of this Court is based upon 28 USC § 1343 (1), (2) and (4) and 28 USC § 1331 and upon principles of pendent jurisdiction.

2. This is an action for damages brought pursuant to the Thirteenth Amendment to the United States Constitution, 42 USC §§ 1981, 1982 and 1985, and the common law, to redress the deprivation of rights, privileges and immunities secured thereby; and to obtain redress for discrimination in the sale and possession of property, which discrimination is a badge and incident of slavery unlawful under the Thirteenth Amendment.

PARTIES

3. Defendants Mr. and Mrs. Philip R. Bloom, who own and reside in the property immediately adjacent to the property where the Plaintiffs live, Mr. and Mrs. Robert C. Brosnan, Mr. and Mrs. C. J. McLaughlin, Jr. and Mr. and Mrs. Lee A. Peters (hereinafter called, collectively, the "Neighbor Defendants") are all white persons, and at times relevant herein, were residents in the neighborhood in Russell, Ohio, where the Plaintiffs attempted to purchase a residence property at 15459 Wenhaven Drive, Russell, Ohio (the "Wenhaven Drive Property"), and eventually did (and now do) reside.

4. Defendant David Solether, dba Solether Realty Company, is a real estate broker licensed by the State of Ohio, who held the listing agreement for sale of the Wenhaven Drive Property, and negotiated with both the Plaintiffs and the Defendant Bloom for purchase of that property.

5. Defendant Paul Mancino, Jr. is an atttorney licensed to practice law in Ohio.

6. The plaintiffs, Milton C. and Emma Sutton, are black citizens who were subjected to obstructive and harassing tactics by the Defendants in an effort to prevent Plaintiffs' purchase of the Wenhaven Drive Property, solely because of their race.

COUNT 1: CLAIM UNDER 42 USC § 1982

7. At all times specified herein each and every Defendant by and through the acts, course of conduct, and legal proceedings hereinafter described acted with the intention of depriving the Plaintiffs of their right to purchase and occupy the Wenhaven Drive Property solely because the Plaintiffs are black citizens, in violation of 42 USC § 1982. All of the acts hereinafter specified, when taken together, constitute a course of conduct which had as its purpose and effect to deprive the Plaintiffs of the same rights as white citizens to purchase, hold and enjoy property.

8. In or about January, 1973, Defendant Solether Realty Company, acting on its own and, at times, in concert with Defendant Bloom, intentionally obstructed the Plaintiffs' attempt to purchase the Wenhaven Drive Property by requiring (as agent for the Seller) more onerous terms than were offered to the Blooms, by refusing to allow a potential mortgagee of the Plaintiffs to view the property, thereby making it difficult for Plaintiffs to obtain financing, and by committing other acts whose purpose, motive, intent and effect were to discriminate against Plaintiffs on racial grounds in Plaintiffs' attempt to purchase the Wenhaven Drive Property.

9. Plaintiffs entered into a purchase agreement to buy the Wenhaven Drive Property from its then owners, Martin and Sally Hawthorne, on January 18, 1973. At that time the property was in the process of foreclosure by the first mortgagee, the Central National Bank. Shortly there-

after, the Blooms and the other Neighbor Defendants secretly conspired to deprive the Plaintiffs of the Wenhaven Drive Property. Pursuant to such conspiracy, Defendants Bloom unsuccessfully attempted to persuade the Hawthornes to dishonor their agreement with Plaintiffs, and to sell the Wenhaven Drive Property to the Blooms instead. The Hawthornes, however, refused to do so.

10. Failing in that scheme, the Neighbor Defendants then attempted to deprive the Suttons of the Wenhaven Drive Property by causing Bloom as their agent, and with their financial backing, to outbid the Suttons at the public foreclosure auction of the Wenhaven Drive Property held in February, 1973.

11. The Geauga County Common Pleas Court, however, refused to confirm the sale of the Wenhaven Drive Property to the Blooms and permitted the Suttons, as successors in interest to the Hawthornes, to redeem the property. The Neighbor Defendants then initiated through Bloom a series of legal maneuvers and legal actions which were undertaken maliciously and in bad faith in an effort to prevent Plaintiffs from taking possession of the Wenhaven Drive Property. Although Plaintiffs ultimately prevailed, the Defendants' maneuvers did delay Plaintiffs taking possession of the aforsesaid property for about one year. Said deprivation caused the Suttons significant economic injury, humiliation and mental suffering.

12. Paul Mancino, an attorney admitted to practice in the State of Ohio, was retained by the Neighbor Defendants for the purpose of aiding them in their plan to obstruct the Plaintiffs' purchase of the Wenhaven Drive Property through protracted and redundant litigation. The Blooms, through Defendant Mancino as their attorney, brought a total of not less than six appeals, and motions for reconsideration. Defendants Bloom lost every motion

and appeal, but nevertheless succeeded in keeping the Suttons in burdensome and expensive litigation, for a period of over two years.

13. Following the Defendants' unsuccessful legal maneuvers in the foreclosure proceedings, said Defendants, with Bloom as the Complainant and Defendant Mancino as his attorney, then initiated a second series of actions against the Suttons in the Federal District Court on or about May 10, 1974. The basis of this action, in which Bloom requested $100,000 compensatory damages and $3,000,000 punitive damages, was that Sutton had allegedly conspired with others to violate Defendant Bloom's civil rights guaranteed by 42 USC 1983, despite the fact that they knew or should have known that they had no valid cause of action. Following the dismissal of that lawsuit by the District Court, the Defendants, through Bloom and Mancino, then appealed the dismissal to the Sixth Circuit Court of Appeals which, in turn, affirmed the dismissal. Still not satisfied, Defendants Bloom and Mancino then filed a motion for reconsideration which was also defeated.

14. On or about May 15, 1974, said Neighbor Defendants, again through Bloom and Mancino, filed another specious lawsuit in the Common Pleas Court of Geauga County against Milton Sutton and others, charging that Sutton and others had willfully, maliciously, intentionally and illegally conspired to deprive Bloom of his constitutional statutory rights to purchase the Wenhaven Drive Property, seeking $100,000 in compensatory damages and $3,000,000 punitive damages. Following the dismissal of that lawsuit on the basis of res judicata, the Defendants once again brought a series of appeals and motions for reconsideration to the Court of Appeals and the Supreme Court of Ohio, to further harass and injure the Plaintiffs and to wear them down financially and psychologically in

an effort to get the Plaintiffs to give up the Wenhaven Drive Property. In none of these appeals and motions were Defendants successful.

15. As a direct and proximate result of the wrongful acts of the Defendants alleged herein, Plaintiffs, Milton and Emma Sutton, have suffered actual damages in the amount of Fifty Thousand Dollars ($50,000), including but not limited to, additional rental and moving costs, reasonable attorneys' fees and legal expenses, mental suffering, humiliation and embarrassment caused by the Defendants' harassment of them because of their race or color, and the deprivation of their constitutional right to purchase, hold, and enjoy their property without regard to race.

WHEREFORE, Plaintiffs demand judgment against the Defendants jointly and severally, under Count I for compensatory damages in the amount of One Hundred Thousand Dollars ($100,000), for punitive damages of Two Hundred Thousand Dollars ($200,000) and attorneys' fees and costs incurred herein, together with such additional relief as the Court may deem appropriate.

COUNT II: CLAIM UNDER 42 USC § 1985

16. Plaintiffs incorporate and adopt by reference as if fully rewritten herein, each and every allegation and averment contained in paragraphs 1 through 15 above.

17. Plaintiffs further allege that the Defendants named herein conspired together to engage in, and did engage in, the course of conduct herein described. In bad faith, they knowingly, intentionally and maliciously attempted to hinder and obstruct the due cause of justice in Ohio, to prevent the Plaintiffs from acquiring a home in a white neighborhood, and to use the legal process and expenses incurred therein as their device and instrument to deprive the Plaintiffs of the equal protection of the laws and their equal privileges and immunities under

the laws. The acts in furtherance of the conspiracy, which acts harassed and injured the Plaintiffs in the exercise of their protected rights, and deprived them of possession of the Wenhaven Drive Property for one year, did in fact deprive them of the same rights to purchase, hold and enjoy real property as they would have had were they white, in violation of 42 USC § 1985.

WHEREFORE, Plaintiffs demand judgment against the Defendants under Count II for compensatory damages in the amount of One Hundred Thousand Dollars ($100,000), for punitive damages of Two Hundred Thousand Dollars ($200,000) and for attorneys' fees and costs incurred herein, together with such additional relief as the Court may deem appropriate.

COUNT II: CLAIM UNDER 42 USC § 1981

18. Plaintiffs herein incorporate and adopt by reference as if fully rewritten herein, each and every allegation and averment contained in paragraphs 1 through 17 above.

19. Plaintiffs further state that acts of the Defendants as hereinabove alleged were done and committed for the purpose of depriving the Plaintiffs of the same rights that white citizens enjoy to make and enforce contracts, to sue, be parties, give evidence, and to enjoy the full benefit of all laws and proceedings for the security of their property. As a direct and proximate result of the wrongful acts of the Defendants alleged herein, the Plaintiffs were deprived of the same and equal benefit of all laws and proceedings for the security of their property as are enjoyed by white citizens in violation of 42 USC § 1981.

WHEREFORE, Plaintiffs demand judgment against the Defendants under Count III for conpensatory damages in the amount of One Hundred Thousand Dollars ($100,000), for punitive damages of Two Hundred Thou-

sand Dollars ($200,000) and for attorneys' fees and costs incurred herein, together with such additional relief as the Court may deem appropriate.

COUNT IV: MALICIOUS PROSECUTION

20. Plaintiffs hereby incorporate and adopt by reference as if fully rewritten herein, each and every allegation and averment contained in paragraphs 1 through 19.

21. The white resident Defendants herein named along with Paul Mancino acting singly and in concert and conspiracy, in bad faith, knowingly, intentionally, and maliciously instituted and continued either directly or indirectly, the legal processes and proceedings hereinbefore described which were in fact, without substance or merit when they knew or should have known that such legal actions were without substance or merit. Both at the inception of and in the continuation of the hereinbefore described legal proceedings, the primary purposes, motivation, intent and desire of the white Defendants was to keep the black Plaintiffs from possession of the Wenhaven Drive Property, to remove them from possession of their property, to harass them and substantially and materially interfere with their enjoyment of the property and to cause their mental suffering and pecuniary injury.

22. The direct and proximate result of the above described repeated legal harassment of the Plaintiffs was to deprive the Plaintiffs of the possession and enjoyment of their property both real and personal, and to cause their mental suffering from both humiliation and embarrassment, and bring about the deprivation of their rights as citizens.

WHEREFORE, Plaintiffs demand judgment against the Defendants under Count IV for compensatory damages in the amount of One Hundred Thousand Dollars

($100,000), for punitive damages of Two Hundred Thousand Dollars ($200,000) and for attorneys' fees and costs incurred herein, together with such additional relief as the Court may deem appropriate.

MICHAEL T. HONOHAN

PETER R. HARWOOD
1100 Citizens Building
Cleveland, Ohio 44114
696-1600

Of Counsel:

BENESCH, FRIEDLANDER, COPLAN & ARONOFF

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing First Amended Complaint has been mailed to each of the following: Deborah A. Coleman and Earl Leiken, 800 National City E. 6th Building, Cleveland, Ohio 44114, attorney for Mr. and Mrs. C. J. McLaughlin, Jr.; Frank Mancino, One Public Square, Suite 1001, Cleveland, Ohio 44113, attorney for Defendant Paul Mancino; R. D. Hertz, Hertz, Kates, Friedman, Kammer & Feldman, 1020 Leader Building, Cleveland, Ohio 44114, attorney for Defendants Mr. and Mrs. Robert C. Brosnan; William J. Manlove, 17800 Chillicothe, Chagrin Falls, Ohio, attorney for Defendant David Solether; Paul Mancino, One Public Square, Suite 101, Cleveland, Ohio 44113, attorney for Defendants Mr. and Mrs. Philip R. Bloom; and Mr. and Mrs. Lee A. Peters, 15417 Wenhaven Drive, Russell, Ohio 44022, this 26th day of January, 1977.

MICHAEL T. HONOHAN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MILTON C. SUTTON

vs.

MR. & MRS. PHILLIP R. BLOOM
MR. LEE A. PETERS

Civil Action File No. C 76-767 JUDGMENT

This action came on for trial before the Court and a jury, Honorable William K. Thomas, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of plaintiff against defendant Phillip R. Bloom, and in favor of defendants Mrs. Phillip R. Bloom and Mr. Lee A. Peters.

It is Ordered and Adjudged that the plaintiff recover from defendant, Mr. Phillip R. Bloom, the sum of $33,101.34 for compensatory damages and the sum of $30,000.00 for punitive damages, for a total sum of $63,101.34, plus interest from the date of this judgment, plus costs.

IT IS FURTHER ORDERED that the complaint, as to defendants, Mrs. Phillip R. Bloom and Mr. Lee A. Peters, is hereby dismissed, with prejudice, at plaintiff's costs.

Dated at Cleveland, Ohio, this 12th day of April, 1978.

WILLIAM K. THOMAS
William K. Thomas, U.S.D.C. Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-76-767

(JUDGE WILLIAM K. THOMAS)

MILTON SUTTON, et al.,
Plaintiffs,

vs.

PHILIP R. BLOOM, et al.,
Defendants.

MOTION FOR RECONSIDERATION.

Now comes the defendant, PHILIP BLOOM, and moves this court to reconsider certain rulings made in this case with respect to the statute of limitations applicable to this cause.

Near the commencement of this suit, a motion for summary judgment or motion for dismissal was filed on behalf of various defendants. One of the grounds raised in the motion for summary judgment or for dismissal was that this action is barred by the applicable statute of limitations.

The court, in prior rulings in this case did not specifically address itself to the statute of limitations question. However, that is an important issue in this case and in view of a recent ruling by the United States Court of Appeals for the Sixth Circuit would bar this action.

This matter was submitted to the jury for a violation of Section 1982 of Title 42 of the United States Code. That statute has no statute of limitations and therefore the court must look to the most analogous state statute of limitations.

Since this involved a matter of housing discrimination the 180 day statute of limitation provided for in Sections 4112.05 and 4112.051 of the Ohio Revised Code.

These actions are clearly barred by that 180 day statute of limitations. The attention of the court is directed to the recently announced decision by the United States Court of Appeals for the Sixth Circuit in *Warner v. Perino,* Case No. 76-2421 (October 10, 1978). In that case, the court held that an action brought under Section 1982 involving housing discrimination is governed by the 180 day statute of limitations provided for in the Ohio statute.

The action in this case was commenced on July 30, 1976. It involved, for the most part, certain actions had during the year of 1974.

The real operative matter concerning this cause involves a meeting alleged between various defendants to purchase the property that was up for foreclosure sale. The foreclosure sale occurred on February 8, 1973. Thus, the actions at that time would be clearly barred by the statute of limitations applicable to this cause.

Further actions concerning the lawsuits were terminated in late 1975 or early 1976. This action was not commenced until July 30, 1976 it was well beyond the 180 days statute of limitations.

Therefore, defendant requests that the court reconsider its prior rulings in this case and dismiss this action on the basis that it is now barred by the statute of limitations as authoritatively decided by the United States Court of Appeals for the Sixth Circuit in *Warner v. Perino.*

PAUL MANCINO, JR.
Attorney for Defendant
One Public Square Building
Suite 1001
Cleveland, Ohio 44113
621-1742

SERVICE

A copy of the foregoing Motion was mailed to Michael Honohan, Attorney for Plaintiff, on this ..... day of October, 1978.

_____

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. C-76-767

(Judge William K. Thomas)

MILTON SUTTON, et al.,
Plaintiffs,

vs.

PHILLIP R. BLOOM, et al.,
Defendants.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Now come the defendants, MR. AND MRS. PHILLIP R. BLOOM, and pursuant to Rule 12 of the Federal Rules of Civil Procedure, and move this court for an order dismissing the complaint and the amended complaint of the plaintiffs for the reasons that it fails to set forth a claim upon which relief may be granted and that this court does not have jurisidiction over the subject matter of the action.

In the alternative, and pursuant to Rule 56 of the Federal Rules of Civil Procedures, defendants move for summary judgment in their favor dismissing the complaint and the amended complaint as there is no genuine issue as to any material fact and the defendants are entitled to a judgment as a matter of law.

PAUL MANCINO, JR.
Attorney for Defendants
One Public Square,
Suite 1001
Cleveland, Ohio 44113
621-1742

SERVICE

A copy of the foregoing Motion was mailed to Michael Honohan, Attorney for Plaintiffs, to Ralph D. Hertz, Attorney for Defendant Brosnan, and to William J. Manlove, Attorney for Solether Realty, on this ..... day of February 1977.

Atttorney for Defendants

MEMORANDUM

Defendants, in support of their motion to dismiss and for summary judgment, incorporate by reference a motion to dismiss and motion for summary judgment which has heretofore been filed on behalf of the defendant, Paul Mancino, Jr.

Most of those arguments, together with the evidentiary materials, are applicable to this motion for summary judgment and motion to dismiss.

Therefore, to avoid repetition of the various arguments and other material submitted in connection with the motion to dismiss or for summary judgment on behalf of the defendant, Paul Mancino, Jr.

PAUL MANCINO, JR.
Attorney for Defendants
One Public Square,
Suite 1001
Cleveland, Ohio 44113
621-1742

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. C-76-767

(Judge William K. Thomas)

MILTON SUTTON, et al.,
Plaintiffs,

vs.

PHILLIP R. BLOOM, et al.,
Defendants.

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Now comes the defendant, PAUL MANCINO, JR., and pursuant to Rule 12 of the Federal Rules of Civil Procedure and moves this court for an order dismissing the complaint and amended complaint of the plaintiffs for the reason that it fails to set forth a claim upon which relief may be granted and that this court does not have jurisdiction over the subject matter of the action.

In the alternative and pursuant to Rule 56 of the Federal Rules of Civil Procedures, defendant moves for summary judgment in his favor dismissing the complaint and amended complaint as there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

In support of the motion for summary judgment, defendant incorporates the answers to interrogatories given by the plaintiffs together with the affidavit of the defendant and also the brief which is attached hereto in support of the motion for summary judgment.

FRANK MANCINO
Attorney for Defendant,
Paul Mancino
One Public Square,
Suite 1001
Cleveland, Ohio 44113
621-8465

I

CLAIM FOR RELIEF UNDER 42 U.S.C. § 1981.

The plaintiffs, in Count II [III], which is set forth in paragraphs 18 and 19 of their amended complaint, seek a claim for relief under Section 1981 of Title 42 of the United States Code. It is clear that no such claim for relief lies under that particular section.

Section 1981 merely states that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and also shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of any kind and to no other.

The statute is merely declaratory of certain rights that came into existence by virtue of the Thirteenth Amendment to the Constitution. However, an action brought under this section gives rise to no claim for relief. One court has stated as follows concerning this section:

> Turning to the Civil Rights Statutes, we find that Section 1981 of Title 42 of U.S.C.A., although it provides all persons are entitled to equal rights under the law, has no provision for civil damages. . . . *Hanna v. Home Ins. Co.*, 281 F. 2d 298, 303 (5th Cir. 1960).

In a decision from this circuit and which was specifically upheld by the Court of Appeals for the Sixth Circuit, it was stated that "Also, Section 1981, 42 U.S.C.A., does not provide a civil cause of action for damages. . . ." *Watson v. Devlin*, 167 F. Supp. 638, 640 (E.D. Mich. 1958), *aff'd*, 268 F. 2d 211 (6th Cir. 1959).

Accordingly, the claim for relief set forth in Count II, which should be Count III, in paragraphs 18 and 19, does not set forth a claim for relief for which damages may be

obtained. In their demand for relief, the defendants are requesting compensatory damages and punitive damages, attorney fees and costs. Clearly, no claim for relief is cognizable under this section and therefore this claim for relief must be dismissed.

II

CLAIM FOR RELIEF UNDER 42 U.S.C. § 1982.

The plaintiffs, in their first claim for relief, seek damages based upon Section 1982 of Title 42 of the United States Code. That section provides that all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Though couched in declaratory terms only, it is apparent that this would prohibit racial discrimination from persons who are in a position to racially discriminate. The Supreme Court, in commenting upon the reach of the statute, held as follows:

> We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color "the same right" to purchase and lease property as is enjoyed by white citizens." As the Court of Appeals in this case evidently recognized, that right can be impaired as effectively by "those who place property on the market" as by the State itself. For, even if the State and its agents lend no support to those who wish to exclude persons from their community on racial grounds, the fact remains that whenever property "is placed on the market for whites only, whites have a right denied to Negros." So long as a Negro citizen wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the *same* right * * * as is enjoyed by white citizens * * * to * * * purchase [and] lease * * * real and personal property" . . . .

> On its face, therefore, § 1982 appears to prohibit *all* discrimination against Negros in the sale or rental of property – discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 "means what it says" – to use the words of the respondents' brief – then it must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanction segregation in housing. Stressing what they consider to be the revolutionary impolications of so literal a reading of Section 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420-22 (1968).

It is therefore evident that in order to be a racially discriminating practice the persons who are allegedly performing the discrimination must be in a position of an owner of property or one who has a voice as to who shall buy, lease or rent.

From the complaint, the plaintiffs contend that the defendants, who are not the owners of the property, the lessors of the property, or those standing in the place of the owners, caused this alleged discrimination. It is specifically alleged in paragraph 9 of the complaint that the owners of the property were Martin and Sally Hawthorne; that the plaintiffs had entered into a purchase agreement to buy the property from the Hawthornes.

The complaint goes on to allege that the Blooms and the neighbor defendants, not including this defendant, attempted unsuccessfully to persuade the Hawthornes to dishonor their purchase agreement with the plaintiffs and sell the property to the Blooms instead, which the Hawthornes refused to do.

The complaint further alleges that the neighbor defendants then attempted to deprive the Suttons of the property by causing Bloom, as their agent, to outbid the

Suttons at a public foreclosure auction of the Wenhaven property in February of 1973.

In paragraph 11 of the complaint it is alleged that the Common Pleas Court refused to confirm the sale and permitted the plaintiffs, as successors in interest to the Hawthornes, to redeem the property. It is alleged that the Blooms allegedly acting on behalf of the neighbor defendants instituted a series of legal maneuvers and legal actions which were undertaken maliciously and in bad faith in an effort to prevent plaintiffs from taking possession of the property. It is alleged that the plaintiffs ultimately prevailed.

It is therefore apparent that there certainly was no discriminatory practice by any of the defendants who were in a position to practice any discriminatory practice. It is not contended that any of the defendants were the owners of the property or were in the position of the owners of the property.

As a matter of fact, although Bloom did outbid Sutton at the foreclosure sale, as being the highest and best bid, the court refused to confirm the sale and ordered that the premises be sold to the plaintiffs. Thus, the plaintiffs were certainly given a decided advantage, and not one contemplated by the law over the defendant.

It would seem from these series of maneuvers and machinations that it was the defendants who were discriminated against because they were white persons and it was the plaintiffs who were given the advantage in the proceedings because they were Negroes.

III

CLAIM FOR RELIEF UNDER § 1985.

The plaintiffs, in Count II of their complaint, seek to set forth a claim for relief under Section 1985. They allege in substance that the defendants conspired to engage in

and did engage in a course of conduct. It is alleged that they engaged in civil litigation.

Apparently, this claim is based upon the second paragraph of Section 1985. It does not appear that that section gives a cause of action or claim for relief to a party injured as does the third paragraph.

An essential element under Section 1985 is that there be an "intent to deny to any citizen equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;"

There is no allegation contained in paragraphs 16 through 19 of the complaint that there was an intent to deny equal protection of the laws. Therefore, no claim for relief is set forth.

The allegations in Count II of the complaint certainly do not set forth a claim upon which relief can be granted. It would seem that if anyone in this case were denied equal protection of the laws, it would be the defendant Phillip Bloom, for certainly the Common Pleas Court of Geauga County bent over backwards to give to the plaintiff, Sutton, a right to which he was not legally entitled. The court permitted Sutton, who had a contract and which by the terms of its contract was null and void when the property was placed on sheriff's sale to purchase the property after Sutton had actively participated in the bid at the sheriff's sale and did not even bid as much at the sheriff's sale as he had contracted to buy the property for. He only bid $39,000, and had agreed to purchase the property for approximately $42,000. Defendant, Phillip Bloom, being the successful bidder and highest bidder in the sum of $40,000, would certainly seem to be entitled to the property.

However, the Common Pleas Court thought otherwise and permitted a last ditch effort on behalf of Sutton

to purchase the property even though he was not the highest and best bidder at the sheriff's sale. It would seem that if anyone's rights were violated it was the rights of Bloom and not that of the plaintiffs.

IV

LIABILITY OF AN ATTORNEY TO THIRD PERSONS.

In this case, the plaintiffs have sued Paul Mancino, Jr., whom it is alleged was the attorney for Phillip Bloom in the civil proceedings alleged in the amended complaint. The amended complaint alleges that there were three civil proceedings which give rise to the instant claim for relief. It is well settled that an attorney is not liable to third persons. This conclusion is so for a number of reasons.

First, based upon elementary principles of the law of agency, the attorney acts for a disclosed principal. It is not a situation where one is acting as an agent for an undisclosed principal. In this case, the attorney would be acting for a disclosed principal, the defendant Phillip Bloom. See 2 Ohio Jur. 2d, *Agency*, § 139 (1953).

In the filing of any lawsuit, the party in whose name the action is brought is disclosed by the pleadings. It is no secret who is the real party in interest and the attorney only brings an action on behalf of the client, unless the attorney himself happens to be the party plaintiff or party defendant.

In this case, it is alleged and the evidence shows that the action was brought in the name of Phillip Bloom. Thus, the attorney filing the action would not be liable.

Secondly, under well settled principles of law, an attorney is not liable to third persons. See 6 Ohio Jur. 2d, *Attorneys at Law*, § 109 (1968).

This rule has been recognized time and time again both by Ohio courts and by federal courts. Thus, in one

case it was stated that "the correct statement of law is that a client is liable for the acts of her attorney performed within the scope of his authority. . . ." *Stewart v. Elias,* 21 Ohio L. Abs. 199, 201 (Ct. App. 1935).

In a Supreme Court decision, the following was stated in this regard:

> Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take out of that general rule, it seems clear that the proposition of the defendant must be sustained. . . . *National Savings Bank v. Ward,* 100 U.S. (10 Otto) 195, 200 (1879).

Moreover, with the institution of actions on behalf of a client, the attorney does not assume personal liability:

> Generally speaking, an attorney is not ordinarily liable to a third party for the acts of his client. More particularly with respect to an allegedly malicious institution of a prosecution, it has been held that the fact that the instigator, in reliance on his attorney's advice, acted to the hurt of another person will not make the attorney liable to that other, even though his advice was erroneous, provided he was not actuated by malicious motives or shared the illegal motives of his client, but had reasonable grounds, on the facts presented to him, to believe that his client had a good cause. Except on proof of his actual knowledge that the charge was groundless, it has been said, an attorney should not be held liable for the malicious prosecution of a third person if it appears that he acted with the authority of his client, solely in interest of his client, and without knowledge of fraud, collusion or sinister intent to injure or deceive a third party. In other words, an attorney will not be held liable for representing his client in good faith, even where the client assumes to dictate a prosecution on his own responsibility. . . . 52 Am Jur. 2d, *Malicious Prosecution,* § 64 at 226 (1970).

This is the rule recognized in Ohio. 35 Ohio Jur. 2d, *Malicious Prosecution*, § 37 (1959).

It is therefore clear that the attorney would not be liable to third persons. This is the entire gist of the amended complaint as it applies to the defendant, Paul Mancino, Jr., whom it is alleged was the attorney for Phillip Bloom, a defendant in this case.

Third, an attorney certainly would have at least a qualified privilege in these situations for which he would not assume personal liability even if his claim is unsuccessful on behalf of his client. While the right to counsel is undoubtedly recognized as a valuable and inherent constitutional right in criminal proceedings, that right does exist even in civil proceedings.

As one Ohio court has noted, "There is an inherent right to counsel as to all matters, be it civil or criminal . . . ." *Siegwald v. Curry*, 40 Ohio App. 2d 313, 315, 319 N.E. 2d 381, 383 (1974).

It is the policy of the law to encourage relationships between attorneys and their clients. It is only through this manner that the client will be willing to give the full facts to the attorney so that the attorney may properly protect the interest of the client. Conversely, the attorney must be given some protection for if upon disclosure of facts he sees that a certain course of action is open to his client, he should not be held liable for the action in the event it is unsuccessful. Ohio clearly recognizes the need for a strong attorney-client relationship. As observed in one case:

> In order for a person to have complete freedom in seeking the services of an attorney, it necessarily follows that disclosures made by such person to an attorney with a view of enlisting the attorney's services in his behalf fall within a rule making communications between an attorney and his client privileged . . . . To hold otherwise would so weaken the rule as to make it useless in many instances and, therefore, would discourage a person from seeking the services

of an attorney which he might sorely need. *Taylor v. Sheldon,* 172 Ohio St. 118, 121, 173 N.E. 2d 892, 897 (1961).

Moreover, Canon I of the Code of Professional Responsibility adopted by the Ohio Supreme Court, 23 Ohio St. 2d at V-VII (1970), states as follows as to the ethical consideration in this relationship:

> EC-1-1. A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

Further, Canon II reads as follows:

> EC-2-1. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

These broad general policies would be completely eliminated if every time a party is unsuccessful in civil litigation, the lawyer is held personally responsible for that action. Clearly, an attorney who acts on the authority of his client is not liable to a third party in an action for malicious prosecution. To hold otherwise would mean an attorney might well be reluctant to offer proper representation to his client for fear of a third party action.

Consequently, for any of the above reasons, the action brought by the plaintiffs against the attorney in this case, Paul Mancino, Jr., does not lie. Therefore, the motion to dismiss or motion for summary judgment should be granted.

V

THE PARTICIPATION IN LEGAL PROCEEDINGS AND THE INSTITUTION OF CIVIL PROCEEDINGS ARE CONSTITUTIONALLY PROHIBITED AND NO CLAIM FOR RELIEF WILL LIE.

The plaintiffs, in their amended complaint, especially in paragraphs 11 through 14 of Count I of the complaint, alleged that the defendants brought a series of legal proceedings and somehow the constitutional rights of the plaintiffs were violated. For reasons shown in other portions of this brief, it is well settled that an institution of civil proceedings does not give a claim for relief.

However, certainly the defendants would have a constitutional right to assemble and associate. This is a right guaranteed by the First Amendment. This important First Amendment right was recognized in *NAACP v. Alabama*, 357 U.S. 449 (1958), where the court stated as follows:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters and state action upon which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. 357 U.S. at 460-61.

Clearly, even a federal statute may not transgress a constitutional guarantee. The constitutional guarantees of the First Amendment are almost absolute in their breach.

The Supreme Court has even stated that private discrimination would violate no constitutional provision or statute. In *Norwood v. Harrison*, 413 U.S. 455, 469 (1973), it was stated that "such private bias is not barred by the Constitution nor does it invoke any sanction of laws. . . ."

Consequently, even if the defendants would have associated together because they did not like black persons, this would be a constitutionally protected area. Consequently, being constitutionally protected, they would have a right to associate for that purpose. This certainly would constitute a cultural matter which is guaranteed by the First Amendment right to associate.

Therefore, even if it be assumed that the allegations contained in the complaint are true, which they are not, this would be constitutionally protected activity. If certain persons living on the street associated together and expressed their dislike for other people on the street or people moving on and into the street or neighborhood, this would be constitutionally protected activity.

Secondly, the main thrust of the complaint, and especially Count I of the complaint, is that there were a series of legal proceedings brought both in the federal and the state courts together with appeals from those decisions. However, this likewise is constitutionally protected. To allow this action would deny to the defendants their constitutional rights to petition a court for a redress of grievances. This is not only a federal constitutional right but is also guaranteed by the Ohio Constitution. The United States Supreme Court has recognized such a right:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature and arms of the executive) and to courts, the third branch of the Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. . . .

> We conclude that it would be destructive of rights of association and petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting their business and economic interests vis-a-vis their competitors. *California Motor Transport, Inc. v. Trucking Unlimited,* 404 U.S. 508, 510-11 (1972).

Moreover, under the Ohio Constitution, Section 16 of Article I provides that all courts in the state are open and every person for an injury done to his land, goods, person or reputation shall have remedy by due course of law.

Therefore, under either the Ohio or Federal Constitutions, the right to petition for a redress of grievances is given to a party who has been effected and to allow the type of action as alleged by the plaintiffs in their amended complaint would interfere with these basic constitutional rights of the defendants. Consequently, no such action does lie in this respect.

VI

NO LIABILITY ATTACHES TO DEFENDANTS FOR PURSUING CIVIL CLAIMS EITHER UNDER STATE OR FEDERAL LAW.

The gist of the amended complaint appears to be that it is claimed that the defendants, through the defendant Bloom, pursued several civil actions against the plaintiffs.

First, the only party plaintiff who was a party to any of the lawsuits was the plaintiff, Milton Sutton. His wife was not a party to any of the civil proceedings.

In essence, it is claimed that there are three civil proceedings which caused a deprivation of alleged civil rights belonging to the plaintiffs. The first is known as the foreclosure proceedings that were filed in the Common Pleas Court of Geauga County. In those proceedings, the

Central National Bank brought a foreclosure action against the Hawthornes to foreclose on its mortgage. The Common Pleas Court of Geauga County ordered that the foreclosure proceed and that the property be sold as upon execution in accordance with the laws of the State of Ohio.

After the foreclosure had been ordered, and the sheriff sale advertising commenced, the plaintiff, Milton Sutton, placed an offer for the purchase of the property, which was accepted by the Hawthornes.

The sheriff sale was to take place in February, 1973. On January 18, 1973, while the advertising was in process, the plaintiff, Milton Sutton, submitted an offer to the Hawthornes. This offer was accepted on January 24, 1973, but contained the conditions to the offer. One of the conditions was that the offer was conditioned on the Suttons' selling his home located in Shaker Heights, Ohio, within 17 days. The second condition of the offer was that it would be null and void and of no further effect if the residence is placed on sheriff's sale at the Geauga Court House. Bloom had a secondary offering for the property, which was conditioned on fact that Sutton would be unable to purchase the same.

However, neither contract was completed prior to the day of the sheriff's sale. At the day of the sheriff's sale, Bloom was the highest bidder. When the matter came for confirmation hearing in the Common Pleas Court, the court permitted Sutton to intervene in the proceedings claiming a right of subrogation to the Hawthornes as to their equity of redemption. Thereafter, the Common Pleas Court refused to allow the confirmation and permitted Sutton to purchase the property in question.

Thereafter, Bloom perfected an appeal to the Court of Appeals for Geauga County, Ohio, which court, in a split decision, upheld the actions of the Common Pleas Court. The Court of Appeals specifically found that there were reasonable grounds for the appeal. Moreover, the

fact that there was a split decision by the judges of the Court of Appeals certainly would be indicative of the merit to the appeal filed by Bloom.

Thereafter, Bloom attempted to appeal to the Ohio Supreme Court, which court dismissed his appeal as of right and also overruled his motion to certify the record of the Court of Appeals, thus terminating those proceedings.

The second proceedings concerns a civil lawsuit for money damages filed by Bloom in the Common Pleas Court of Geauga County. The Common Pleas Court of Geauga County dismissed that case claiming that Bloom was barred under the doctrine of res judicata from this civil lawsuit. An appeal was taken from that decision to the Court of Appeals for Geauga County, which court also in a split decision affirmed the Common Pleas Court, the Court of Appeals also holding that there were reasonable grounds for the appeal. An attempted appeal to the Ohio Supreme Court was dismissed when the appeal by Bloom as of right was denied by the Ohio Supreme Court and his motion to certify the record of the Court of Appeals was also overruled.

The third lawsuit involves a 1983 action filed in the United States District Court, which case was assigned to Judge William K. Thomas. That action was dismissed by the District Court on the basis that there was lack of state action and therefore the claim would not lie under 1983. An appeal of the United States Court of Appeals for the Sixth Circuit resulted in an affirmance.

It is essentially these three lawsuits which formed the basis of the complaint of the plaintiffs in this case. However, either under federal law or under state law, no liability attaches for the filing and commencement of civil actions.

With respect to the foreclosure case, it must be noted that neither Bloom nor Sutton were parties to that case until

after the sale. Under applicable Ohio law, a purchaser at a judicial sale becomes a party to the proceedings who is entitled to be heard upon confirmation and also becomes a party so that he has a right of appeal. See *Citizens Loan & Savings Co. v. Stone*, 1 Ohio App. 2d 551, 206 N.E. 2d 17 (1965).

Thus, Bloom by being the highest bidder at the foreclosure sale, automatically became a party to the proceedings. Sutton became a party to the proceedings by virtue of his motion to intervene in the foreclosure case which was thereafter granted.

Bloom, once being a party to the proceedings, had an automatic right as of appeal under the applicable Ohio law. Section 3 of Article IV of the Ohio Constitution provides for appellate review jurisdiction of the courts of appeals in Ohio. Section 2501.02 of the Ohio Revised Code, together with Rule 3 of the Ohio Rules of Appellate Procedure, provide an appeal as of right to a party aggrieved by a judgment or final order.

Likewise, with respect to the right of appeal in a federal court, Section 1291 of Title 28 of the United States Code provides for an appeal as of right from final decisions of District Courts.

Consequently, as Bloom is not an attorney, he has the right to be represented by counsel in these proceedings. Given the constitutional and statutory right of appeal, he certainly has a right to exercise that appeal. Moreover, since the Court of Appeals for Geauga County specifically found that there were reasonable grounds for the appeals in both cases in that court, certainly this would show that those appeals were brought in good faith. The fact that the Court of Appeals entered into a two to one decision affirming the judgment of the Common Pleas Court certainly shows that at least one judge thought there was merit to the claims of Bloom. Certainly, he brought these in good

faith with probable cause and not maliciously as claimed by the plaintiffs.

Further, under applicable Ohio law, the institution of a civil proceeding does not give rise to any claim for relief. In *Delk v. Colonial Finance Co.*, 118 Ohio App. 451, 194 N.E. 2d 885 (1963), the Court of Appeals for Hamilton County held as follows in paragraph 1 of its syllabus:

> In an action for malicious prosecution, plaintiff must plead and prove, by the preponderance of the evidence, every essential element to maintain the action, including want of probable cause, and malice, express or implied.

Moreover, in order to maintain an action for malicious prosecution as a result of a civil action, there must either be the arrest of a person or the actual seizure of property. This necessary requirement was recognized in paragraph 1 of the syllabus in *Perry v. Arshman*, 101 Ohio App. 285, 136 N.E. 2d 141 (1956):

> As a general rule, no suit will lie for malicious prosecution of a civil action where there has been no arrest of the person or seizure of property.

This is essentially the same law as applicable to these proceedings as announced by the Ohio Supreme Court in *Cincinnati Daily Tribune v. Bruck*, 61 Ohio St. 489, 56 N.E. 198 (1900).

The reasons for these rules were adequately summarized in the *Perry* case:

> (1) "Costs" are given as adequate redress; (2) courts should be free and open to all without fear of being sued in return; (3) freely permitting malicious prosecution actions would make interminable; (4) defendant should have no right to a malicious prosecution action, since plaintiff has no action if a defense is malicious and groundless. 101 Ohio App. at 287, 136 N.E. 2d at 143.

Thus, since the principals would not be liable in these proceedings, certainly the attorney who represented any of the principals would not also be liable.

Rule 11 of the Federal Rules of Civil Procedure together with cognate state rule, Rule 11 of the Ohio Rules of Civil Procedure, provide for the signing of pleadings by the attorney for the party. In the civil actions, Bloom was represented by two attorneys, Robert Jaffe and Paul Mancino, Jr. The signing of the pleading merely states that the attorney has read the pleading and to the best of his knowledge, information and belief there is good ground to support it and that it is not interposed for delay.

Neither of the civil proceedings for money only would constitute either a seizure of property or arrest of the plaintiff, which are necessary ingredients for the malicious prosecution of a civil proceedings. The fact that the party is unsuccessful does not give rise to civil liability.

The plaintiffs were given adequate remedy under the law where a case is dismissed that they recover their costs. Moreover, upon an appeal, if the Court of Appeals determines that the appeal is brought for delay, damages may be awarded. Thus, Rule 38 of the Federal Rules of Appellate Procedure provides that if an appeal is frivolous, it may award just damages and single or double costs to an appellee. Moreover, Rule 23 of the Ohio Rules of Appellate Procedure likewise provides for such relief.

If the plaintiffs thought that the appeals were without merit and brought for the purposes of delay or were frivolous appeals, they could have filed a motion in the Court of Appeals for Geauga County or the United States Court of Appeals for the Sixth Circuit. They have not done so and this would be the adequate form for a determination of these matters.

Therefore, the claims of the plaintiff under Count I, although denominated a claim under Section 1982, and

also the claim under Count IV, the malicious prosecution claim, do not lie. Therefore, these must be dismissed.

VII

THE ACTIONS OF THE PLAINTIFFS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

It appears that none of the three federal statutes under which the claims of the plaintiffs are brought, have any applicable statute of limitations. While pointing out that the claims are without merit, it also appears that these claims are barred by any applicable statute of limitations.

The claim under 1982 has no statute of limitations. Therefore, the court may apply the most applicable state statute of limitation if there exists one. *Johnson v. Railway Express Agency, Inc.*, 489 F. 2d 525 (6th Cir. 1973), *aff'd*, 421 U.S. 454 (1975).

If these are deemed an action for malicious prosecution, then such an action must be brought within one year after the cause thereof arose as provided for in Section 2305.11 of the Ohio Revised Code. Otherwise, it is barred as provided for in Section 2305.03 of the Ohio Revised Code.

In an action for malicious prosecution, there must be a finding in favor of the defendant. Thus, it would be the judgment of the Common Pleas Court in each instance or the judgment of the District Court in this case. In each of those cases, as revealed by the answers to interrogatories, these would be time barred. Thus, the civil action, Case No. C-74-431, was dismissed on October 40, 1974.

The civil action filed in the Common Pleas Court of Geauga County was also dismissed in 1974.

The foreclosure action was never filed by Bloom but even if it be considered that Bloom were a party to the

proceedings, it would appear that when his motion to confirm the sale was denied that this would start the time running which would be in March of 1974.

Thus, these claims would be barred under the applicable Ohio statute of limitations.

However, more analogous to the claims of the plaintiffs are that the defendants engaged in discriminatory housing practices. Thus, the court must apply the most analogous state statute governing the same.

A disciriminatory housing practice under federal law would be barred if the civil action is not commenced within 180 days after the discriminatory housing practice occurred as provided for in Section 3612 of Title 42 of the United States Code.

Discriminatory housing practices are defined in Section 4112.02 (H) of the Ohio Revised Code. The state statute of limitation on these claims is set forth in Section 4112.05 of the Ohio Revised Code which limits the time to 180 days after the act occurred.

Thus, these claims certainly would be barred under the most analogous state statute of limitations or even any federal statute of limitations concerning discriminatory housing practices.

VIII

LACK OF JURISDICTION OVER COUNT IV OF THE COMPLAINT.

The plaintiffs, in Count IV of the complaint, have set forth a state action based upon malicious prosecution. While that fails to set forth a claim upon which relief can be granted, it is also apparent that the court does not have subject matter jurisdiction. While the plaintiffs seek to assert jurisdiction as a pendent claim based upon other federal jurisdiction in this case, that claim is without merit. It would appear that the lack of jurisdiction is controlled by the case of *Aldinger v. Howard*, 96 S. Ct. 2413 (1976).

IX

THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE MOVANT IS ENTITLED TO SUMMARY JUDGMENT.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be granted if from the pleadings, answers to interrogatories, affidavits, and other evidentiary material before the court there is no genuine issue and that the party moving for summary judgment is entitled to judgment as a matter of law.

In this case, the plaintiffs have brought an action joining Paul Mancino, Jr., as a defendant in the action; they claim that he was a part of an alleged conspiracy.

However, as pointed out, attorney Paul Mancino, Jr., only represented the defendant Phillip Bloom; that he never met any of the other neighbor defendants and that he has never met the plaintiff, Emma Sutton, nor was she ever made a party to any of the proceedings, all of the proceedings being brought against Milton Sutton.

The record in this case shows that essentially the claims of the plaintiffs are that various legal actions and appeals were brought concerning the sale of the premises together with civil actions for money damages.

It is well settled under the law that an action for money damages does no lie either under Federal law or state law.

Further, with respect to the matter of the appeal concerning the refusal to confirm the sale, it was specifically found by the Court of Appeals for Geauga County that there were reasonable grounds for the appeal, and the Court of Appeals in a two-to-one decision affirmed the judgment of the Common Pleas Court.

Clearly, under the law applicable thereto, there is no material issue and the defendant, Paul Mancino, Jr., is clearly entitled to a summary judgment in his favor.

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Cleveland, Ohio 44113
621-1742

STATE OF OHIO
} SS:
COUNTY OF CUYAHOGA

PAUL MANCINO, JR., being first duly sworn, deposes and says that he is one of the defendants in the within action and that the following statements are made from his own personal knowledge.

Affiant states that he is an attorney at law, duly admitted to practice law in the State of Ohio.

Affiant states that the only person that he has ever represented in any legal proceeding is the defendant, PHILLIP BLOOM; that he has never represented any of the neighbor defendants identified in the complaint and amended complaint; that he has never met any of the neighbor defendants identified in the amended complaint as Mr. and Mrs. Robert C. Brosnan, Mr. and Mrs. C. J. McLaughlin, Jr., and Mr. and Mrs. Lee A. Peters; that of the neighbor defendants, the only person that he has ever met is Mr. Robert C. Brosnan, and this was during the course of a deposition of Mr. Robert C. Brosnan taken after the institution of this case and which deposition was taken in the office of the attorney for the plaintiffs on or about December 14, 1976, and this would be the first time that he ever met Robert C. Brosnan.

Affiant further states that he has never met Mrs. Phillip Bloom and the only person that he has ever had contact with and done any legal work for was the defendant, Phillip Bloom.

Affiant further states that there are three legal proceedings which formed the subject of the amended complaint, one being the foreclosure action filed in the Common Pleas Court of Geauga County and the second being a civil action for money damages brought against Milton Sutton in the Common Pleas Court of Geauga County, Ohio, and the third being a civil action for money damages

in the United States District Court for the Northern District of Ohio.

Affiant states that the foreclosure action in the Common Pleas Court of Geauga County, Ohio, arose when the Central National Bank, which held a first mortgage on the premises that had been then owned by Martin Hawthorne and Sally Hawthorne, filed a foreclosure action in the Common Pleas Court; that the foreclosure action was filed on or about September 14, 1972; that on or about December 11, 1972, a decree of foreclosure was entered by the Common Pleas Court of Geauga County, Ohio, which ordered that the premises be foreclosed unless the Hawthornes, within three days, exercised their right of redemption, which the Hawthornes failed to do.

Affiant states that thereafter the property was ordered to be sold by the sheriff and the sheriff of Geauga County, Ohio, undertook to advertise the property, advertising that a sheriff's sale would take place on February 8, 1973.

Affiant further states that on or about January 18, 1973, while the advertising for the property was then in process, the plaintiff, Milton Sutton, submitted an offer to Martin and Sally Hawthorne to purchase the premises; that the offer of Milton Sutton contained the following provisions:

> a) "This offer is conditioned on purchaser selling his home located 3617 Glencairn Road, Shaker Heights, Ohio, 44122, within 17 days after date of Seller's acceptance. Seller shall have the right to continue to show his house for sale to secondary buyers. If a secondary offer is received, purchaser shall have 72 hours after written notice to either remove his condition or declare this offer null and void. If this contract becomes null and void, earnest money shall be returned to purchaser. This offer is also conditioned on all plumbing in good working order and free of leaks at time of transfer of deed.

b) This contract shall be null and void and of no further effect if said residence is placed on Sheriff Sale at Geauga Court House."

Affiant states that on or about January 29, 1973, the defendant, Phillip Bloom, made a secondary offering for the premises then owned by the Hawthornes and which was in the process of being sold at public auction.

Affiant states that neither of the purchase contracts was completed prior to the date of the sheriff's sale; that on February 8, 1973, the premises was placed on sheriff's sale at the Geauga County Court House; that the plaintiff, Milton Sutton, was there and actively engaged in the bidding; that Milton Sutton bid less at the sheriff's sale than he had agreed to pay in his contract of purchase, but during the course of the bidding stopped; that the highest bidder at the sheriff's sale was Phillip Bloom who bid the sum of $40,000 for the premises and the sheriff advised the court that Phillip Bloom was the highest bidder.

Affiant further states that thereafter a motion to confirm the sale was filed in the Common Pleas Court on February 9, 1973 and was set for a hearing on February 20, 1973; that approximately 15 minutes before the hearing on the confirmation of the sale, Milton Sutton, through his attorneys, filed a motion to intervene as a defendant and filed a separate motion to deny confirmation together with a supporting brief.

Affiant states that the defendant, Phillip Bloom, was not served with copies of the motion or brief and was not made a party to the proceedings; that Phillip Bloom, after learning that the confirmation hearing would be delayed, then formally hired counsel to represent him in the proceedings; that attorney Robert Jaffe was hired to represent the defendant Phillip Bloom in the proceedings concerning the confirmation.

Affiant further states that the Common Pleas Court of Geauga County, Ohio, refused to confirm the sale and that

thereafter an appeal was perfected to the Court of Appeals for Geauga County, Ohio.

Affiant states that during the proceedings and filing the brief and assignments of error on behalf of Phillip Bloom in the Court of Appeals for Geauga County, defendant Bloom was represented by attorney Robert E. Jaffe.

Affiant states that he did not enter the foreclosure case until September 19, 1974, which was shortly before oral argument of the case on appeal.

Affiant states that there is attached hereto the announcement of decision and judgment entry of the Court of Appeals for Geauga County, which court in a two-to-one decision affirmed the judgment of the Common Pleas Court; that the Court of Appeals for Geauga County, Ohio, specifically found that there were reasonable grounds for the appeal.

Affiant further states that thereafter there was filed in the Common Pleas Court of Geauga County, Ohio, on or about May 15, 1974, a civil action against the plaintiff, Milton Sutton, but not against his wife, Emma Sutton, and other individuals, a civil action for damages arising out of the matter; that the Common Pleas Court of Geauga County, Ohio, proceeded to dismiss this action stating that the action was barred under the doctrine of res judicata as these issues had been determined in the previous foreclosure action; that the civil action was filed by attorneys Robert Jaffe and Paul Mancino, Jr., on behalf of Phillip Bloom and on behalf of no other individual; that it was brought in good faith based upon the facts as they had been given to the undersigned.

Affiant states that after the dismissal of the action by the Common Pleas Court of Geauga County, Ohio, an appeal was then taken to the Court of Appeals for Geauga County, Ohio, which court, in a split two-to-one decision, affirmed the judgment of the Common Pleas Court; that

a copy of the opinion of the Court of Appeals together with its judgment entry is attached hereto and made a part hereof; that the Court of Appeals for Geauga County, Ohio, specifically found that there were reasonable grounds for the appeal.

Affiant states that the third action was a civil action brought under 1983 in the United States District Court for the Northern District of Ohio; that it was filed on behalf of the defendant, Phillip Bloom, by Robert Jaffe and Paul Mancino, Jr., acting as attorneys for Phillip Bloom; that it was brought in good faith and was based upon facts as they were known at that time.

Affiant states that the United States District Court dismissed this action on the basis that there was no state action which would support a 1983 action; that a copy of the decision of the United States District Court is attached hereto.

Affiant states that he at no time conspired with any other person and that he was only aware that Phillip Bloom was interested in purchasing the premises and that he brought all actions on behalf of Phillip Bloom; that he was totally unaware that there were any other individuals who were even interested in the purchase of the premises; that at the time of the filing of these actions he had no knowledge as to the identity of Milton Sutton, but was aware of the proceedings that had occurred concerning the purchase at the sheriff's sale and the failure of the Common Pleas Court to confirm the sale to Phillip Bloom; that he at all times acted in good faith and based his actions upon the facts as they were presented to him.

Affiant further states that he took over these proceedings at the time that attorney Robert Jaffe, who had represented Phillip Bloom throughout the proceedings, accepted a position with the Social Security Bureau of Appeals and was required to leave the Cleveland area;

that up until this time in May or June of 1974, Robert Jaffe had solely represented the defendant, Phillip Bloom.

PAUL MANCINO, JR.

Sworn to and subscribed on this day of January, 1977.

Notary Public

SERVICE

A copy of the foregoing Motion for Summary Judgment has been mailed to Michael Honohan, Attorney for Plaintiffs, to Ralph D. Hertz, Attorney for Defendant, Brosnan, to William J. Manlove, Attorney for Solether Realty, on this .... day of ....., 1977.

FRANK MANCINO
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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

MILTON SUTTON, et al.,
Plaintiffs,

v.

PHILLIP R. BLOOM, et al.,
Defendants.

Civil Case
No. C-76-767

MEMORANDUM AND ORDER

THOMAS, J.

This case, alleging violations of plaintiffs' rights under 42 U.S.C. §§ 1981 and 1982, was tried in March, 1978, and resulted in a jury verdict for plaintiffs against defendant Bloom in the amount of $33,101.34 compensatory damages and $30,000.00 punitive damages. The case is now before the court on defendant Bloom's motion for reconsideration on the ground that under a recently decided sixth circuit case, the appliable statute of limitations had run prior the filing of the complaint, and therefore the case must be dismissed.[1]

Defendant argues that the recent decision in *Warner v. Perrino*, No. 76-2421 (6th Cir., filed October 10, 1978),

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[1]The statute of limitations issue was originally raised by defendant prior to trial, but was not expressly ruled upon. Defendant Bloom is now renewing his original motion in the form of a motion for reconsideration. The court notes, however, that defendant Bloom did not seek a ruling on his motion or otherwise raise the issue again prior to the submission of the case to the jury. For the purposes of this ruling, it will be assumed that defendant Bloom has not waived his statute of limitations defense.

mandates a dismissal of this action. In response plaintiffs argue that *Warner* does not control their case, and that the motion for reconsideration should therefore be denied. *Warner* was an action under 42 U.S.C. § 1982 alleging that "defendant refused 'to show or to rent to plaintiff' the downstairs suite of a two-family house in Cleveland 'because plaintiff is Black.'" Slip op. at 1. The court of appeals held that in a housing discrimination case under section 1982, the analogous state statute of limitations to be applied (in Ohio cases) is the 180-day statute of limitations provided for by Ohio's fair-housing laws, Ohio Revised Code § 4112.02(H)(1). The court reasoned:

> Not only does the Ohio statute of limitations apply equally to both state and federal suits, thus removing the possibility of discrimination against the federal right, but the 180-day limit is borrowed directly from the federal Fair Housing Act, 42 U.S.C. § 3612. . . . Furthermore, unlike some other federal civil rights suits which have no comparable, state cause of action, see *Mason v. Owen-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975), we have in this case a state fair housing law which is virtually identical to the Federal Fair Housing Act of 1968 and provides plaintiff the same cause of action in state court which he has under either section 3617 or 1982. Although section 1982 speaks broadly of contract rights and is wider in scope than either the state and [*sic*] federal fair housing laws, the conduct at issue here involves only an allegation of housing discrimination on the basis of race and falls squarely within the purpose and reach of Ohio's fair housing laws.

Slip. op. at 6-7.

Plaintiffs argue that *Warner* does not control the present case because their action was submitted to the jury under 42 U.S.C. § 1981 in addition to and as an alternative to 42 U.S.C. § 1982; therefore the six-year statute of limitations under Ohio Revised Code § 2305.07, rather than the 180-day statute of limitations under Ohio Revised Code

§ 4112.02 (H)(I), would apply. They further argue that their case could not have been brought under ORC § 4112.02 (H) because "the cause of action in the instant case is broader in scope than any action appropriate to a private litigant under the Ohio Civil Rights Act," and because all the relief sought and obtained (i.e., punitive damages) is not available under the Ohio cause of action. Therefore, they urge that *Warner* does not apply, since the *Warner* court, in the language quoted above, clearly indicated it was dealing only with the situation in which the federal cause of action is the same as that available under state law.

This court concludes that *Warner v. Perrino* does not require a dismissal of this action.

Although the "operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866" *Tillman v. Wheaton-Haven Recreation Ass'n*, 410, U.S. 431, 439 (1973), each creates a separate and distinct cause of action. Section 1981 "relates primarily to racial discrimination in the making and enforcement of contracts," *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (footnote omitted), thus differentiates sections 1981 and 1982:

> Just as in *Jones [Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)] a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.

Although the evidence received at trial was not separately identified as applying to the section 1981 claim or the section 1982 claim, the claims were separately

identified in the jury instructions. After the applicable text of each section was read to the jury, and before the separate claims of plaintiffs were presented to the jury, the court charged:

> Therefore, these laws forbid one to interfere for a racially discriminatory purpose, as the sole purpose or as one of several purposes, with the right of another to purchase or hold real property [Section 1982] *or* with another's right to make and enforce a contract to purchase real property [Section 1981].

Likewise the jury, as indicated by its answers to the interrogatories, found either one or the other cause of action was established, or both. "Interrogatory [Question] No. 2," and the answers to it, read as follows:

> Has the plaintiff Milton C. Sutton by a preponderance of all the evidence proved that in violation of sections 1982 and 1981:
>
> (1) Philip Bloom by bidding at the Sheriff's Sale had as his sole purpose, or as one of several purposes, the deprivation of Milton C. Sutton's right to purchase and hold real property or the deprivation of Milton C. Sutton's contractual rights under his purchase agreement with the Hawthornes?
>
> Answer: Yes.
>
> (2) Philip Bloom sought confirmation of his bid at the Sheriff's Sale and prosecuted the foreclosure-confirmation proceedings before Judge Ford, and the appeals therefrom, having as his sole purpose, or as one of several purposes, the deprivation of Milton C. Sutton's right to purchase and hold the Hawthorne property or the deprivation of Milton C. Sutton's contractual rights under his written purchase agreement with the Hawthornes?
>
> Answer: Yes.

While the interference of Philip Bloom either by bidding at the sheriff's sale, or by seeking confirmation of his bid at sheriff's sale (and later prosecution of the fore-

closure-confirmation proceedings) was an identical ingredient of each cause of action, the consequential "deprivation of Milton C. Sutton's right to purchase and hold real property" in violation of section 1982 was separate and exclusive from the "deprivation of Milton C. Sutton's contractual rights under his purchase agreement with the Hawthornes," in violation of section 1981. Therefore, the statute of limitations that applies to claims under section 1982 would not be controlling of claims under section 1981.

It is clear that plaintiffs' claim under 42 U.S.C. § 1981 was not barred by the appropriate statute of limitations. The sixth circuit in *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975), held that the most analogous state statute of limitations to be applied in actions bought under 42 U.S.C. § 1981 is the six-year statute of limitations provided for by Ohio Revised Code § 2305.07. The court reasoned:

> Plaintiff's action is founded upon a federal statute, 42 U.S.C. § 1981, creating a cause of action unknown at common law. We conclude that the most analogous action under state law would be an action upon a liability created by statute within the meaning of O.R.C. § 2305.07.

In this case the jury was distinctly instructed on the law applicable to 42 U.S.C. § 1981 in addition to the law applicable to 42 U.S.C. § 1982. The jury was told that various acts, for which it later found defendant Bloom liable, constituted violations of "section 1981 or section 1982 or both." It may be presumed that the verdict would have been the same even if the court had dismissed the section 1982 claims and submitted the case entirely under section 1981. Since the statute of limitations had not run prior to the filing of the section 1981 claim, and the verdict is supportable under section 1981, it is not affected by defendant's statute of limitations argument.

Furthermore, it is not clear that the 180-day statute of limitations would apply even to the claims under section 1982. The case is not a typical example of a seller refusing to sell to a buyer because of the buyer's race. Here, the seller was quite willing to sell; it was neighbor Bloom who objected to the buyer's race. Because his acts, designed to prevent plaintiffs from purchasing the Wenhaven Drive property ultimately failed, the case involves attempts to interfere with plaintiffs' "right to purchase and hold real property" and does not fit into one of the statutory causes of action under Ohio Revised Code § 4112.02. In addition, plaintiffs in this action sought and obtained substantial punitive damages, a remedy not available under the Ohio Fair Housing Act. Ohio Revised Code § 4112.051(E) restricts damages to "actual damages". Thus, because the cause of action asserted here under section 1982 is broader than the cause of action available under state law, the rationale in *Warner v. Perrino* for applying the 180-day statute of limitations is inapplicable, and the claim is not barred by the statute of limitations.

For the reasons stated above, defendant's motion for reconsideration is denied.

IT IS SO ORDERED.

WILLIAM K. THOMAS

WILLIAM K. THOMAS, U.S.D.C. Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 80-3058

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MILTON SUTTON and
EMMA SUTTON,
Plaintiffs-Appellees,

v.

PHILLIP R. BLOOM,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed June 27, 1983

Before: MERRITT and MARTIN, Circuit Judges; PORTER, Senior District Judge.*

MERRITT, Circuit Judge, delivered the opinion of the Court, in which MARTIN, Circuit Judge, joined. PORTER, Senior District Judge, (pp. 9-14) filed a separate dissenting opinion.

MERRITT, Circuit Judge. Appellant, Phillip Bloom, appeals from a jury verdict and judgment against him in this housing discrimination case for $33,101.34 in compensatory damages and $30,000.00 in punitive damages. The appellees, Milton and Emma Sutton, are a black married couple who attempted in January, 1973 to purchase a

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*The Honorable David S. Porter, Senior District Judge for the Southern District of Ohio, sitting by designation.

home on Wenhaven Drive in Russell Township, Ohio. The Suttons brought this action in the District Court for the Northern District of Ohio under 42 U.S.C. §§ 1981, 1982 and 1985 claiming that Phillip Bloom, who lived next door, and seven other neighbors acted to prevent their purchase of the home in order to keep black persons out of the neighborhood. A pendent state law claim alleging malicious prosecution was dismissed by the District Court. During the proceedings, the seven other defendants prevailed, entered into settlement agreements with the Suttons, or were dismissed by the District Court.

The Suttons sought to purchase the house owned by Martin and Sally Hawthorne. The property was subject to a foreclosure decree entered on December 11, 1972, on behalf of Central National Bank. On January 24, 1973, the Hawthornes accepted an offer from the Suttons to purchase the home for $42,000. The agreement was conditioned on the Suttons first selling their own home and on the plumbing of the Hawthorne home being in good working condition. The Hawthornes in turn had the right to continue to show the home to secondary buyers, but if a secondary offer were received, the Suttons had three days to remove the two conditions and finalize the purchase.

After the Suttons and Hawthornes signed the conditional purchase agreement, the appellant became interested in the Hawthorne property. Bloom made a secondary offer on the house which was rejected when the Suttons withdrew their conditions. Despite the Suttons' purchase agreement, the Bank elected to proceed with a sheriff's sale of the foreclosed upon property. The Bank is not a party in this case, and no claim of discrimination or breach of contract against it is before us.

One night before the foreclosure sale, Bloom held a meeting of neighbors at his house to organize an attempt to prevent the Suttons from purchasing the Hawthorne home. Bloom collected $1000 from each of three neighbors

which, together with his $1000, would provide the $4000 downpayment (10% of their maximum intended bid) for the home. At the sheriff's sale, Bloom outbid the Suttons with a bid of $40,000. On March 28, 1973, however, the Court of Common Pleas of Geauga County refused to confirm the sheriff's sale to Bloom finding that the agreement between the Suttons and the Hawthornes gave the Suttons the benefit of the owner's equity of redemption. After several appeals by Bloom, this order was finalized by the Court of Common Pleas on March 18, 1974.

Bloom then brought suit simultaneously in the Court of Common Pleas and in the Federal District Court in May 1974, charging the Suttons with depriving him of his statutory and constitutional rights to purchase the home. The state and federal courts, at both the trial and appellate levels, rejected these actions under the principle of res judicata or for failure to state a claim.

The Suttons then brought this suit in the District Court on July 30, 1976, seeking compensatory and punitive damages to vindicate their rights under the Constitution and under §§ 1981, 1982, and 1985. The Suttons showed at trial that Bloom had assembled his neighbors and pursued his attempts to purchase the Hawthorne property for improper discriminatory motives. The jury found that Bloom violated the constitutional and statutory rights of the Suttons. We are compelled to reverse the decision of the district court because we find that the case is barred by the statute of limitations.

Neither § 1981, which prohibits discrimination in the making or enforcing of contracts,[1] nor § 1982, which guarantees equal rights to purchase property,[2] contain statutes of limitations. To ascertain the proper statute of limitations, the court must look to the most analogous state statute *See Runyon* v. *McCrary*, 427 U.S. 160, 180, 96 S.Ct. 2586, 49 L.Ed. 2d 415 (1976); *Warner* v. *Perrino*, 585 F.2d 171, 173 (6th Cir. 1978) ("Thus, where Congress has not otherwise spoken, federal judges are obliged to apply the law of the forum, which includes state statutes of limitations, to suits brought in federal court."). The appellant argues that the 180 day statute of limitations contained in the Ohio Fair Housing Act, O.R.C. § 4112.051(A), should apply. The appellees maintain that the District Court was correct when it found the six year statute of limitations contained in O.R.C. § 2305.07 most analogous.

Sections 1981 and 1982 of Title 42 were enacted as part of the Civil Rights Act of 1866 in order to eliminate the vestiges of slavery and racial discrimination. The underlying factual situation in this lawsuit involves the attempt by Bloom to interfere with the Suttons' equal rights to enter into a contract (§ 1981) and to buy prop-

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[1]42 U.S.C. § 1981 provides in full:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[2]42 U.S.C. § 1982 provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

erty (§ 1982). Both statutes cover the discrimination present in this case, but that does not imply that each statute may be viewed in isolation when finding the most analogous state statute. The District Court and the appellee isolated the word "contract" in § 1981. They then looked to the Ohio statute, O.R.C. § 2305.07, which governs the statute of limitations for contracts not in writing:

> . . . an action upon a contract not in writing, express or implied, or upon a liability (created by statute) other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

They have ignored the circumstances surrounding the interference with the Suttons' right to contract which involve racial discrimination. We believe that the most analogous state statute, when viewing the facts of this case in total, is the Ohio Fair Housing Act. O.R.C. § 4112.02(H) broadly covers discrimination in housing and property ownership, including the right to be free from discrimination when making a contract to purchase a home. The relevant part of § 4112.02(H) provides:

> It shall be an unlawful discriminatory practice:
> (H) For any person to:
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> (1) Refuse to sell, transfer, . . . or otherwise deny or withhold housing accommodations from any person because of the race, color, religion, sex, ancestry, handicap or national origin of any prospective owner, occupant, or user of such housing.
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> (12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed . . . any right guaranteed or protected by division (H) of this section . . . .

The Ohio Fair Housing Act applies to the factual circumstances of this case. It seeks to protect against the same

injustices which the federal Civil Rights Act of 1866 sought to combat.

The statute of limitations for actions brought under § 4112.02(H) is contained in O.R.C. § 4112.05(A):

> The rights granted by Division (H) of section 4112.02 of the Revised Code may be enforced by aggrieved private persons by filing civil actions in a court of common pleas. . . . A civil action shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occurred.

Our conclusion is supported by the decision of this Court in *Warner* v. *Perrino*, 585 F.2d 171 (6th Cir. 1978). In that case, the plaintiff filed suit against the owner of a two-family home in Cleveland alleging that she had refused to show or rent an apartment to him because he was black. The complaint alleged violations of 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. §§ 3604 and 3617. We held that the applicable Ohio statute of limitations for the § 1982 cause of action was the 180 day limit contained in O.R.C. § 4112.051(A). We noted that:

> Although section 1982 speaks broadly of contract rights and is wider in scope than either the state and federal fair housing laws, the conduct at issue here involves only an allegation of housing discrimination on the basis of race and falls squarely within the purpose and reach of Ohio's fair housing laws.

Warner, supra, at 175. Unlike the plaintiff in *Warner*, the Suttons have included a claim under § 1981 for violation of their contract rights but the *essence* of their claim is racial discrimination in housing. As in *Warner*, this "falls squarely within the purpose and reach of Ohio's fair housing laws," particularly the proscription in § 4112.02(H)(12) against third-party interference because of race with the right to purchase housing.

The District Court and the appellees rely on another case from this Circuit which applied Ohio's six year statute

of limitations to a § 1981 cause of action. In *Mason* v. *Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975), the plaintiff charged that the company had engaged in unlawful employment practices by refusing to promote and by discharging him solely because of his race. We held that this § 1981 cause of action was not barred by the 180 day statute of limitations contained in the Ohio Civil Rights Act but was governed instead by O.R.C. § 2305.07 on contracts not in writing.

We do not find *Mason* controlling in this case because of the difference between Ohio's statutes of limitations in employment and in housing discrimination cases. The Ohio Civil Rights statute on employment discrimination is governed by the statute of limitations contained in § 4112.05(B) which sets up an administrative as opposed to a judicial process for grievance resolution. The 180 day limitation period pertains to the amount of time within which an injured party must file a complaint with the state civil rights commission. If a complaint is ever filed in court, it is filed by the Commission and not the private litigant. The Commission has an additional 180 days to file a complaint in court. In contrast, the 180 day period provided for in § 4112.051(A), for housing discrimination, relates to the period within which a grievant must initiate a judicial proceeding. As is made clear in the dicta in *Mason*, this Court refused to apply the 180 day limit contained in § 4112.05(B) in *Mason* precisely because a different process – administrative as opposed to judicial – is used in employment discrimination cases brought under the Ohio Civil Rights Act than is used in § 1981 cases. There is no difference between the procedures utilized for state housing discrimination cases and those used for a § 1981 suit.

We noted in *Mason* that the shorter limitations period of 180 days might have seemed more appropriate to the Ohio legislature when the responsibility for the investiga-

tion and development of the case rested with the administrative body rather than with a private litigant. *Mason, supra,* at 522. In contrast, the Ohio Legislature has clearly found it appropriate to require the private litigant to seek redress for housing discrimination within six months. For these reasons, we apply the holding in *Warner* and not *Mason,* and find that the most analogous state statute is the 180 day statute of limitations in § 4112.051(B).

The parties are in agreement that, if applied, the 180 day statute of limitations creates a bar to this action. The discriminatory acts complained of by the Suttons occurred in 1973 and 1974. The Suttons instituted this proceeding in the District Court on July 30, 1976. We need not discuss whether the series of suits initiated by Bloom against the Suttons tolls the statute of limitations because the final order in those proceedings was entered on January 8, 1976 — more than six months prior to the Suttons' case.

For these reasons, we reverse the decision of the District Court.

PORTER, Senior District Judge dissenting: I respectfully dissent from the Court's decision reversing the district court's judgment on the ground that this case is barred by the 180-day statute of limitations contained in the Ohio Fair Housing Act, O.R.C. § 4112.051(A). I would affirm the district court's holding that the applicable statute of limitations in this case is the six-year limitations period provided in O.R.C. § 2305.07 for liabilities created by statute, and that therefore the action is not time-barred. The fundamental reason for my disagreement with the Court on this issue is that I do not believe this is simply a "housing discrimination case." In support of my position, I feel compelled to give a fuller statement of the operative facts.

I.

On January 18, 1973, the Suttons entered into an agreement to buy property which was in the process of

foreclosure by Central National Bank of Cleveland. When Bloom, the owner of the property located next door to the subject property, learned of the Suttons' agreement, he immediately presented a secondary offer to purchase the property. The Suttons then withdrew the contingencies to their offer and Bloom failed to obtain the subject property by a superseding contract.

Despite the Suttons' purchase agreement, Central National Bank elected to proceed with the scheduled sheriff's sale of the foreclosed upon property. The sheriff's sale was scheduled for February 8, 1973. On the night prior to the sheriff's sale, Bloom and three of his neighbors met in the basement of Bloom's home to plan to outbid the Suttons at the sale. Bloom and the three neighbors agreed to bid up to $40,000.00 at the sale, and each agreed to contribute $1,000.00 for the 10% downpayment that would be required. At the sheriff's sale, Bloom appeared and bid $40,000.00, outbidding the Suttons for the property.

On March 28, 1973, the Court of Common Pleas of Geauga County, Ohio refused to confirm the sheriff's sale of the subject property to Bloom, and instead awarded the property to the Suttons on the ground that the Suttons, by virtue of their purchase contract, had the benefit of the owner's equity of redemption in those proceedings.[1]

Bloom then filed a notice of appeal from the Order of the Common Pleas Court, and while the appeal was pending, obtained a stay of execution of the judgment. Bloom thereby blocked the Suttons from taking possession of the property while the appeal was pending. The appeal was dismisssed by the Ohio Court of Appeals, without dissent, because it clearly had been taken from a non-appealable order. Bloom then applied to the Court of Appeals for

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[1]Bloom had filed a motion with the Common Pleas Court on March 23, 1973, requesting that he be made a party to the foreclosure litigation.

reconsideration of its dismissal, but the application was denied and the case was remanded to the Geauga County Common Pleas Court.

On March 18, 1974, the Common Pleas Court again ruled that the sheriff's sale should not be confirmed, and entered a final order transferring title to the Suttons. Bloom once again appealed to the Ohio Court of Appeals and filed a motion to stay execution of the judgment. That time, the Court of Appeals overruled the motion to stay the proceedings. Then, after the Common Pleas Court entered its final judgment on March 21, 1974, dismissing the foreclosure action, Bloom, for a third time, filed a motion to stay execution. The Court of Appeals again overruled Bloom's motion to stay on April 4, 1974.

On February 18, 1975, the Court of Appeals heard the case on its merits and affirmed the trial court. Bloom once again moved for a reconsideration, and once again the Court of Appeals affirmed the trial court's decision.

Thereafter, Bloom moved the Court of Appeals for an order certifying the case to the Ohio Supreme Court on the ground that there was a conflict between its decision and that of another Court of Appeals in Ohio. The Court of Appeals overruled the motion to certify, and Bloom appealed to the Supreme Court of Ohio. The Ohio Supreme Court, *sua sponte*, disposed of Bloom's appeal on October 24, 1975.

After that line of litigation, Bloom commenced two others. In May 1974, Bloom filed an action in the Geauga County Common Pleas Court against the Suttons seeking, *inter alia*, $100,000.00 in actual damages and $3,000,000.00 in punitive damages on the basis of an alleged willful, malicious, intentional and illegal participation in a "conspiracy" to deprive Bloom of his constitutional and statutory right to purchase the subject property. The trial court, finding no merit in this claim, dismissed it on the pleadings, holding that the matter was *res judicata* due to the earlier litigation. Bloom again appealed, and once again, the

Court of Appeals upheld the trial court, holding, *inter alia*, that Bloom had failed to state a claim against Sutton. Bloom once more applied for reconsideration and his motion was overruled. He then appealed that decision to the Ohio Supreme Court, and such appeal was dismissed *sua sponte* on January 8, 1976.

At the same time that Bloom filed his second action in the Geauga County Common Pleas Court, he filed a companion case, substantially similar to the Geauga County action, in the United States District Court, Northern District of Ohio, Eastern Division, seeking $100,000.00 compensatory and $3,000,000.00 punitive damages, alleging that the Suttons had conspired with others to purchase the real estate in question. The district court (Thomas, J.) dismissed the complaint for failure to state a claim under 42 U.S.C. § 1983. Bloom then moved for a new trial or for a rehearing. That motion was denied. Bloom appealed from the district court's decision to this Court. This Court rejected the appeal, concluding that ". . . this action is nothing more than an attempt to utilize jurisdiction for the purpose of reversing or modifying the civil judgment of the state court. . . ."

The Suttons maintain that, "[t]he ultimate result of all of the actions of the Appellant and the complex web of legal maneuvers was to deprive the Suttons of actual possession of their home for an entire year, to harrass [sic] and annoy them for many months thereafter and to cost them legal fees exceeding $15,000.00." Brief of Appellees at 6.

On July 30, 1976, the Suttons filed the instant action alleging that their constitutional rights guaranteed by 42 U.S.C. §§ 1981, 1982 and 1985 had been violated, and further, that they had been victims of a course of malicious prosecution. The claim of malicious prosecution was dismissed.

The evidence at trial showed that Bloom had been motivated in his actions by his desire to prevent blacks

from moving into the neighborhood. On this basis, the jury returned a verdict against Bloom in favor of the Suttons.

II.

The Court concludes that the most analogous state statute is the Ohio Fair Housing Act, which it says "broadly covers discrimination in housing and property ownership, including the right to be free from discrimination when making a contract to purchase a home." Yet appellees filed this action under section 1981, which prohibits discrimination in the making and enforcement of contracts, as well as under section 1982, which guarantees equal rights to purchase real and personal property.

Admittedly, the same facts are the basis for plaintiffs' claims under both sections 1981 and 1982; however, plaintiffs stated two separate causes of action. The thrust of plaintiffs' cause of action under section 1981 is the enforcement of their statutorily-created right to contract, and redress for a course of extreme conduct interfering with that right. In this regard, it does not matter that the contract was for a home. It could have been a contract for employment or for personal property. What is significant is that appellant Bloom interfered with the Suttons' right to contract because the Suttons are black.

Thus, I conclude that this is not a typical housing discrimination case. The defendant-appellant here is not the owner of the subject property, but a third party who was bent on preventing the enforcement of the Suttons' contract to purchase the property. He executed his discriminatory mission not only by making a second offer for the property and by organizing his neighbors for the purpose of outbidding the Suttons at the sheriff's sale, but also by instituting a barrage of litigation to frustrate the Suttons' enjoyment of the same contractual rights as white persons.

Furthermore, an individual who establishes a cause of action under section 1981 may, under certain circumstances, obtain punitive damages. *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 460 (1975). Punitive damages, however, are not available under the Ohio Fair Housing

Act. Section 4112.051(E) of that Act, O.R.C. § 4112.051(E), only provides for injunctive relief and "actual damages, together with the court costs." Thus, for this reason as well, I conclude that the cause of action asserted by the Suttons under section 1981 is broader than a cause of action under the Ohio Fair Housing Law, and that the rationale for applying the 180-day limitations period of the state's housing act is inapplicable.

I conclude that the most analogous state cause of action is an action upon a liability created by statute, the statute here being section 1981. Accordingly, I would apply Ohio's six-year limitations period contained in O.R.C. § 2305.07, as the district court did, and affirm the district court's judgment that this action is not time-barred.[2] Since I would not have dismissed the action as untimely, I would have reached the other issues on appeal.

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[2]I disagree with the Court that the district court and the appellees isolated the word "contract" in § 1981 and for that reason applied the limitations period provided in O.R.C. § 2305.07 governing contracts not in writing. First, I doubt that the contract involved in this case was an oral contract. Moreover, the district court cites language from *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975), which indicates that the six-year limitations period was applied because it covers actions upon a liability created by statute. *Cf. Balmes* v. *Board of Education*, 436 F. Supp. 129, 132 (N.D. Ohio 1977) (a cause of action commenced in Ohio under § 1981 is limited by a six-year statute of limitations).

I recognize that my position in this case could be latched onto by plaintiffs in federal housing discrimination actions who want to circumvent the six-month statute of limitations contained in Ohio's housing discrimination statute, since nearly every housing discrimination case involves interference in the making or enforcement of contracts. I therefore wish to emphasize that this is a unique case. I believe that the facts of *this* case support my conclusion that this is not a typical housing discrimination case, and that the cause of action asserted here is broader than a cause of action under the Ohio Fair Housing Law. I propose that the court consider the facts of each case presented to determine whether or not the plaintiff added a section 1981 claim to the complaint only in an effort to avoid the shorter limitations period, and disallow any such attempted circumvention.

42 U.S.C. §§ 3601 et Seq. (Fair Housing Act)

§ 3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§ 3602. Definitions

As used in this subchapter –

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees in cases under Title H, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, or 3606 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

§ 3603. Effective dates of certain prohibitions

Application to certain described dwellings

(a) Subject to the provisions of subsection (b) of this section and section 3607 of this title, the prohibitions against discrimination in the sale or rental of housing set forth in section 3604 of this title shall apply:

(1) Upon enactment of this subchapter, to –

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to April 11, 1968;

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to April 11, 1968; *Provided,* That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b) of this section.

Exemptions

(b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to –

(1) any single-family house sold or rented by an owner: *Provided,* That such private individual owner does not own more than three such single-family houses at any one time: *Provided further,* That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period; *Provided further,* That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: *Provided further,* That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or if such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

Business of selling or renting dwellings defined

(c) For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if –

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

§ 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination

based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

§ 3605. Discrimination in financing of housing

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided,* That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

§ 3606. Discrimination in provision of brokerage services

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin.

§ 3607. Religious organization or private club exemption

Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

§ 3608. Administration

(a) The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

(b) The Secretary may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this subchapter. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105, 3344, 5372, and 7521 of Title 5. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

(1) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(2) publish and disseminate reports, recommendations, and information derived from such studies;

(3) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

§ 3609. Education and conciliation; conferences and consultations; reports

Immediately after April 11, 1968, the Secretary shall commence such educational and conciliatory activities as in his judgment will further the purposes of this subchapter. He shall call conferences of persons in the housing industry and other interested parties to acquaint them with the provisions of this subchapter and his suggested means of implementing it, and shall endeavor with their advice to work out programs of voluntary compliance and of enforcement. He may pay per diem, travel, and transportation expenses for persons attending such conferences as provided in section 5703 of Title 5. He shall consult with State and local officials and other interested parties to learn the extent, if any, to which housing discrimination exists in their State or locality, and whether and how State or local enforcement programs might be utilized to combat such discrimination in connection with or in place of,

the Secretary's enforcement of this subchapter. The Secretary shall issue reports on such conferences and consultations as he deems appropriate.

§ 3610. Enforcement

Person aggrieved; complaint; copy; investigation; informal proceedings; violations of secrecy; penalties

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

Complaint; limitations; answer; amendments; verification

(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

Notification of State or local agency of violation of State or local fair housing law; commencement of State or local law enforcement proceedings; certification of circumstances requisite for action by Secretary

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this subchapter which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

Commencement of civil actions; State or local remedies available; jurisdiction and venue; findings; injunctions; appropriate affirmative orders

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: *Provided,* That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

Burden of proof

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

Trial of action; termination of voluntary compliance efforts

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

§ 3611. Evidence

Investigations; access to records, documents, and other evidence; copying; searches and seizures; subpenas for Secretary; interrogatories; administration of oaths

(a) In conducting an investigation the Secretary shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation: *Provided, however,* That the Secretary first complies with the provisions of the Fourth Amendment relating to unreasonable searches and seizures. The Secretary may issue subpenas to compel his access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpenas or interrogatories were issued or served in aid of a civil action in the United States district court for the district in which the investigation is taking place. The Secretary may administer oaths.

Subpenas for respondent

(b) Upon written application to the Secretary, a respondent shall be entitled to the issuance of a reasonable

number of subpenas by and in the name of the Secretary to the same extent and subject to the same limitations as subpenas issued by the Secretary himself. Subpenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request.

Compensation and mileage fees of witnesses

(c) Witnesses summoned by subpena of the Secretary shall be entitled to the same witness and mileage fees as are witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpena issued at the request of a respondent shall be paid by him.

Revocation or modification of petition for subpena; good reasons for grant of petition

(d) Within five days after service of a subpena upon any person, such person may petition the Secretary to revoke or modify the subpena. The Secretary shall grant the petition if he finds that the subpena requires appearance or attendance at an unreasonable time or place, that it requires production of evidence which does not relate to any matter under investigation, that it does not describe with sufficient particularity the evidence to be produced, that compliance would be unduly onerous, or for other good reason.

Enforcement of subpena

(e) In case of contumacy or refusal to obey a subpena, the Secretary or other person at whose request it was issued may petition for its enforcement in the United States district court for the district in which the person to whom the subpena was addressed resides, was served, or transacts business.

Violations; penalties

(f) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if in his power to do so, in obedience to the subpena or lawful order of the Secretary, shall be fined not more than $1,000 or imprisoned not more than one year, or both. Any person who, with intent thereby to mislead the Secretary, shall make or cause to be made any false entry or statement of fact in any report, account, record, or other document submitted to the Secretary pursuant to his subpena or other order, or shall willfully neglect or fail to make or cause to be made full, true, and correct entries in such reports, accounts, records, or other documents, or shall willfully mutilate, alter, or by any other means falsify any documentary evidence, shall be fined not more than $1,000 or imprisoned not more than one year or both.

Attorney General to conduct litigation

(g) The Attorney General shall conduct all litigation in which the Secretary participates as a party or as amicus pursuant to this Act.

§ 3612. Enforcement by private persons

Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605 and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be

commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Injunctive relief and damages; limitation; court costs; attorney fees

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award

to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

§ 3613. Enforcement by Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint; preventive relief

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

§ 3614. Expedition of proceedings

Any court in which a proceeding is instituted under section 3612 or 3613 of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited.

§ 3615. Effect on State laws

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision

of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

§ 3616. Cooperation with State and local agencies administering fair housing laws; utilization of services and personnel; reimbursement; written agreements; publication in Federal Register

The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this subchapter. In furtherance of such cooperative efforts, the Secretary may enter into written agreements with such State or local agencies. All agreements and terminations thereof shall be published in the Federal Register.

§ 3617. Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

§ 3618. Authorization of appropriations

There are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this subchapter.

§ 3619. Separability of provisions

If any provision of this subchapter or the application thereof to any person or circumstances is held invalid, the remainder of the subchapter and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

§ 3631. Violations; bodily injury; death; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.